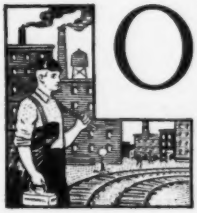
CASE AND COMMENT

Vol. 17 SEPTEMBER, 1910 No. 4

Boycotts

Principles Applicable in Determining the Lawfulness of a Boycott by a Labor Union

BY ALMOND G. SHEPARD



ONE of the vexing questions growing out of industrial disputes, yet to be settled, is the right of members of labor organizations to bestow their patronage or beneficial intercourse, and the right to control or induce the acts of others in the bestowal of their patronage or beneficial intercourse, to the injury of those whom they denominate unfriendly to labor and with whom they are at the time engaged in an industrial dispute. In the solution of this question, many variant theories have been formulated, all to a greater or less degree based upon certain fundamental principles of law, which are also involved in much uncertainty and confusion. It is this latter fact which has occasioned, to a great extent at least, the conflict to be found in the decisions involving the lawfulness of the exercise by unions of different means to divert the trade, not only of their membership, but also of third persons, from those with whom they are engaged in an industrial dispute.

Unfortunately, in passing upon this question, some courts have formulated doctrines which would seem to have no application in matters of litigation other than industrial disputes. This has given rise to the claim upon the part of labor unions and their friends that some courts are partial to the employer in disposing of questions relating to industrial disputes. It seems to be quite generally conceded that there is some ground for this claim, at least in some instances, and to an extent sufficient to have received recognition and notice in the platforms of the two great political parties, and to have been the subject of a bill in Congress relating to such controversies in the Federal courts, which has the approval of the President, who himself, when judge, was frequently called upon to determine many of the questions involved in litigation of this character, and whose utterances on the subject will hereafter be more particularly noticed.

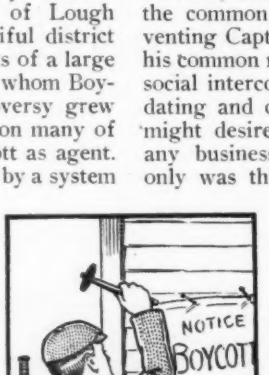
Origin and Meaning of Term "Boycott."

In view of the foregoing conditions, it is a matter of considerable importance to determine whether the proper disposal of such questions requires the application of any principles of law other than such as would be properly applicable to substantially similar questions not involving industrial disputes.

The question raised, although broader than acts usually comprised within the term "boycott," is generally denominated by that term, and it will be so referred to herein. Indeed, the fact that the term "boycott" has been extended to cover substantially all cases involving attempts by labor unions to divert trade or patronage

from some person with whom they are having a controversy is one reason for the confusion which has arisen with reference to the general question as to the right of labor unions to divert trade or patronage.

As originally employed, the term "boycott" designated a controversy between Captain Boycott, a farmer of Lough Mark, in the wild and beautiful district of Connemara, and the tenants of a large landowner of that district for whom Boycott was agent. The controversy grew out of the service of notices on many of the tenants by Captain Boycott as agent. The tenants at once retaliated by a system of persecution in the form of inaction, which they enforced by intimidation and violence little short of murder. The method pursued is thus described by Mr. Justice McCarthy in his work entitled "England under Gladstone:" "The population of the region for miles round resolved not to have anything to do with him, and, as far as they could prevent it, not to allow anyone else to have anything to do with him. His life appeared to be in danger,—he had to claim police protection. His servants fled from him as servants flee from their masters in some plague-stricken Italian city. The awful sentence of excommunication could hardly have rendered him more helplessly alone for a time. No one would work for him; no one would supply him with food. He and his wife had to work in their own fields themselves, in most unpleasant imitation of Theocritan shepherds and shepherdesses, and play out their grim eclogue in their deserted fields with the shadows of the armed constabulary ever at their heels. The Orangemen of the north heard of Captain Boycott and his sufferings, and the way in which he was holding his ground, and they organized assistance, and sent him down armed laborers from Ulster. To prevent civil war, the authorities had to send a force of soldiers and police to Lough Mark, and Captain Boycott's harvests were brought in and his potatoes dug by the armed Ulster laborers, guarded always by the little army."



Thus, the term was originally employed to designate not only a policy of inaction, but an active interference with the common rights of another by preventing Captain Boycott from exercising his common right of holding business and social intercourse with others, by intimidating and coercing such persons as he might desire to deal with from having any business dealings with him. Not only was this boycott unlawful for the reason mentioned, but for the further reason that the primary purpose or object was maliciously to injure and annoy Captain Boycott, and not for the direct purpose of benefiting those engaged therein. As thus employed, the term "boycott" designated acts which were unlawful *per se*, whether indulged in by a single individual or a collection of individuals. It may be observed that in designating a boycott unlawful *per se*, the courts since that time have apparently had reference to the term as thus employed, rather than to its wider scope.

Thus, President Taft, then judge, said that the essential feature of boycotting was the exclusion of the employer from all communication with former customers and materialmen by threats of similar exclusion of the latter if dealings were continued.[1]

It was undoubtedly with this understanding of the term that this learned jurist and statesman, in a later case[2] remarked that "boycotts, though unaccompanied by violence or intimidation, have been pronounced unlawful in every state of the United States where the question has arisen, unless it be in Minnesota.

[1] Moores v. Bricklayers' Union No. 1, 23 Ohio L. J. 48.

[2] Thomas v. Cincinnati, N. O. & T. P. R. Co. 4 Inters. Com. Rep, 788, 62 Fed. 803.

They are held to be unlawful in England." This case involved the right of employees to refuse to handle the cars of another company for the purpose of coercing their employer to break off business relations with such company, without thereby expecting to obtain any direct advantage to themselves, but primarily for the purpose of injuring such company.

Cases involving such a state of facts do not present as serious a question as does the question of the right of a labor organization to divert the trade of its members and others from one with whom they are having a controversy, although there is a considerable conflict among the courts as to the right of labor organizations to direct their members to refuse to handle the product of one with whom they are at war industrially.[3]

Doctrine of Conspiracy.

The general question as to the right to divert trade is not so easily disposed of. Some courts, apparently influenced in part at least by the foregoing cases, and in part by the application of a generally disapproved and obsolete principle that an act, though lawful if done by a single individual, is rendered unlawful if done by a collection of individuals, have asserted that attempts by labor organizations to divert the patronage of their membership and third persons from a person with whom they were having an industrial controversy, are unlawful, although no intimidation or coercion is resorted to, other than the mere fact of numbers, and even though the primary object sought was lawful and the means employed, if done by one, lawful.[4]

The reasoning of these cases is to the effect that, although it may be lawful for a single individual to bestow his patronage as he chooses, and to induce or persuade others to bestow their patronage in accordance with his ideas, yet such action by a number of individuals, although the object sought be a lawful one, is unlawful because of the mere fact of the number engaged therein,—that of itself amounting to unlawful coercion and intimidation; and such an attempt is denominated a conspiracy and enjoined in equity on that ground.

This reasoning is a departure from the well-settled rules relating to torts and conspiracies, and will not stand the test applicable thereto.

As Affected by Lawfulness of Organization.

In the first place, it must be conceded that a labor organization organized for the purpose of obtaining better wages, shorter hours, and otherwise enhancing or benefiting the condition of the members, is a lawful organization. In a late case[5] the contention was made that the purpose and effect of labor organizations was subversive alike of the fundamental rights of the employer to manage his own business and of the employees to bestow their labor as they might elect. Answering this contention the court said: "This kind of argument enters deeply into the domain of political science, and might well be addressed to a body of constructive statesmen, or men originally contemplating a labor organization; it is an argument that would be pertinent against the organization of society into government. The will of the individual must consent to yield to the will of the majority, or no organization, either of society into government, capital into combination, or labor into coalition, can ever be effected. The individual must yield in order that the many may receive a greater benefit. The right of labor to organize for lawful purposes, and by organic agreement to subject individual members to rules, regulations, and conduct prescribed by the majority, is no longer an open question in the jurisprudence of this country."

And in a well-considered English case[6] Lord Herschell remarked that it was not for their Lordships to express any opin-

[3] Note in 12 L.R.A.(N.S.) 642.

[4] Oxley Stave Co. v. Coopers' International Union, 72 Fed. 695; Loewe v. California State Federation of Labor, 139 Fed. 71; Rockey Mountain Bell Teleph. Co. v. Montana Federation of Labor, 156 Fed. 809; Martin v. McFall, 65 N. J. Eq. 91, 55 Atl. 465; George Jonas Glass Co. v. Glass Bottle Blowers' Asso. 72 N. J. Eq. 653, 66 Atl. 953; American Federation of Labor v. The Bucks Stove and Range Company, 37 Washington Law Rep. 154 (161, 162).

[5] Wabash R. Co. v. Hannahan, 121 Fed. 563.

[6] Allen v. Flood [1898] A. C. 129, 17 Eng. Rul. Cas. 285.

ion on the policy of trade unions, membership of which may undoubtedly influence the action of those who have joined them, and added: "They are now recognized by law; there are combinations of employers as well as of employed. The members of these unions, of whichever class they are composed, act in the interest of their class. If they resort to unlawful acts, they may be indicted or sued. If they do not resort to unlawful acts, they are entitled to further their interests in the manner which seems to them best and most likely to be effectual."

Concert of Action When Act Otherwise Lawful.

It would seem clear that there is nothing in labor unions themselves which could be said to amount to a conspiracy as that term is generally understood. At common law, a conspiracy was a combination of persons combined to commit a felony. As thus used, it could have no possible application to the question. At the present time, a conspiracy is generally defined to be a confederation to do something unlawful either as a means or an end.[7] Before the courts may punish or prevent a conspiracy, either the act conspired or the manner of its doing must be unlawful.[8] A conspiracy cannot be made the subject of a civil action, unless something is done which without the conspiracy would give a right of action.[9]

As it is a general rule grounded in the fundamental principles, that an act which, if done by one alone, would constitute no cause for action in tort, cannot be made the ground of such an action or the basis for relief by alleging it to be done by or through a conspiracy of several. The quality of the act and the nature of the injury inflicted must determine the question.[10]

The cases which apply the doctrine that an act lawful if done by one becomes unlawful if done by many, because the mere fact of numbers constitutes unlawful intimidation or coercion, or because the injury inflicted is greater, and hence is a conspiracy, not only assert a doctrine that will not stand comparison with the general doctrine of conspiracy, but assert a test that is illogical as well. In substance, it amounts to an assertion that concerted action is illegal because it is concerted action, thus completely ignoring the well-settled doctrine that the foundation of every action of tort, apart from the question of malice, is an act wrongful and which may be qualified legally as an injury. "It is essential in tort that the act complained of be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will, however directly, do him harm in his interests is not sufficient."[11]

The only English support for the doctrine that mere concert of action may make an otherwise lawful act unlawful is the famous case of the Tubwomen v. The Brewers of London, an apparently mythical case, wherein the rule was supposed to have been declared that it was unlawful for the tubwomen of London to have resorted to concerted action to secure better wages. No such case is reported, and the only case that could reasonably be said to be referred to is that of Attorney v. Starling,[12] which, however, does not sustain the rule as thus broadly stated.

The general theory of conspiracy as an element in determining the lawfulness of an attempt by a labor organization to divert trade, based upon the theory that such attempt by the concerted action of a number of individuals constitutes a conspiracy, although the act would be lawful if done by one, does not receive the support of the weight of authority of this country, and is disapproved by the English decisions. In this connection, and before taking up the cases that disapprove of this doctrine, it may be of benefit to remember that an individual has the undoubted right to bestow his patronage

[7] State v. Bacon, 27 R. I. 252, 61 Atl. 653.

[8] Jetton-Dekle Lumber Co. v. Mather, 53 Fla. 969, 43 So. 590.

[9] Cooley, Torts, 3rd ed. 210; Bowen v. Matheson, 14 Allen, 499; Robertson v. Parks, 76 Md. 118, 24 Atl. 411; Brackett v. Griswold, 112 N. Y. 454, 20 N. E. 376; Martens v. Reilly, 109 Wis. 464, 84 N. W. 840; Huttley v. Simmons [1898] 1 Q. B. 181, following Kearney v. Lloyd, Ir. L. R. 26 Eq. 268.

[10] Kimball v. Harman, 34 Md. 407, 6 Am. Rep. 340; Hutchins v. Hutchins, 7 Hill. 104; Adler v. Fenton, 24 How. 407, 16 L. ed. 696; Wellington v. Small, 3 Cush. 145, 50 Am. Dec. 719; Cotterell v. Jones, 11 C. B. 713.

[11] Rogers v. Rajendro Dutt, 13 Moore P. C. C. 209.

[12] 1 Keble, 650.

upon whomsoever he pleases. This may be said to be a positive right which he may exercise without being called to account for his motive or reason in bestowing his patronage upon one individual and refraining from patronizing another. In addition to this positive right, he has the common right to enjoy the benefits of his occupation, trade, or business without unlawful interference from others. He has a right to resort to lawful means to better his condition, and to that end, if he is a laborer, he has a right to buy the products produced by his employer and refuse to buy the product of some one whom he deems to be unfriendly to his interests. If he has this right as an individual, there is no lawful reason why he cannot exercise this right in concert with others equally interested with him, unless the doctrine of conspiracy as already considered be applied. If he is engaged in an industrial dispute with his employer, he has the undoubted right to refrain from bestowing any of his patronage upon such employer. And, in order to bring to a successful end such controversy, he has the common right of interfering with his employer's business to the extent of inducing others to refrain from patronizing such employer, providing he does not attempt actual coercion and intimidation other than appeals and moral suasion. This, however, is a common or qualified right, and, as will be hereafter shown, is unlawful if the primary purpose is to maliciously injure the business of his employer rather than to aid himself.

Test of Legality of Concerted Action.

In determining the question of the lawfulness of the exercise of these rights by a collection or combination of individuals acting in concert, the same test should be applied as is applicable in determining the exercise of the same right by an individual.

And it may be said that the weight of authority in this country, and the settled rule of England, is to apply these principles in determining the lawfulness of the exercise of the same right by a labor union. As applied to a combination of traders, it has been held that what one trader may do in respect of competition, a body or set of traders can lawfully do. In a leading English case involving this question[13] Lord Morris so declared the rule, and asserted that "a body of traders whose motive object is to promote their own trade can combine to acquire and thereby in so far to injure the trade of competitors, provided they do no more than is incident to such motive object and use no unlawful means."

The latest utterance of the English court upon this question is that of Bigham, J.[14] who remarked that "an actionable conspiracy exists when a number of men combine either to do an unlawful act or to do a lawful act by unlawful means. I have already said that, in my opinion, the acts of the individual defendants were not unlawful and there is good authority for saying that a combination entered into for the mere purpose of doing a lawful act cannot constitute an actionable conspiracy. In order to give a cause of action, the combination to do the lawful act must be entered into with a malicious intention of damaging the plaintiff, and must cause him damage. Here no such conspiracy ever in fact existed, for there never was any malicious intention."

This is also the doctrine of the majority of the American courts. In one of the leading cases on the subject[15] the court said: "To maintain a bill on the ground of conspiracy, it is necessary that it should appear that the object relied on as the basis of the conspiracy, or the means used in accomplishing it, were unlawful. What a person may lawfully do, a number of persons may unite with him in doing, without rendering themselves liable to the charge of conspiracy."

In another leading case on the subject[16] Mr. Justice Parker, speaking for the majority of the court, declared the rule to be that "whatever one man may do alone, he may do in combination with others, provided they have no unlawful

[13] Mogul S. S. Co. v. McGregor [1892] A. C. 25.

[14] Glamorgan Coal Co. v. South Wales Miners' Federation [1903] 1 K. B. 136.

[15] Macauley Bros. v. Tierney, 19 R. I. 255, 61 Am. St. Rep. 770, 33 Atl. 1, 37 L.R.A. 455.

[16] National Protective Asso. v. Cumming, 170 N. Y. 315, 88 Am. St. Rep. 648, 63 N. E. 369, 58 L.R.A. 135.

object in view. Mere numbers do not ordinarily affect the quality of the act."

Upon the same question in a later case[17] it was said: "It is not in the breast of the court to stamp as illegal a combination for the betterment of the interests of the members thereof, or of some of them, and which, without incidental violence or intimidation, severs all business dealings with an outsider until it may secure it. If this be illegal, where can we draw the line so as to countenance association to insure united, and, therefore effective, action to right what seems wrong, or to correct what seems an abuse, or to mark disapproval of some policy in the everyday affairs of our social life? The protest of one under threat of abstention may be unheeded in view of the slightness of the penalty, when a like protest of many, with similar threat, is effective, and only because the penalty is too great to pay. . . . It may be that the result of the boycott is a loss to him proscribed. Else, the combination would fail of its purpose. But, when the result sought by a boycott is to protect the members of the combination, or to enhance their welfare, that loss is but the incident of the act, the means whereby the ultimate end is gained."

On the same subject in a late decision by the supreme court of Montana[18] it is said: "There can be found running through our legal literature many remarkable statements that an act perfectly lawful when done by one person becomes, by some sort of legerdemain, criminal when done by two or more persons acting in concert, and this upon the theory that the concerted action amounts to a conspiracy. But with this doctrine we do not agree. If an individual is clothed with a right when acting alone, he does not lose such right merely by acting with others, each of whom is clothed with the same right. If the act done is lawful, the combination of several persons to commit it does not render it unlawful. In other words, the mere combination of action is not an element which gives character to the act. It is the illegality of the purpose to be accomplished, or the illegal means used in furtherance of the purpose, which makes the act illegal."[19]

Mr. Justice Holmes in a very able dissenting opinion[20] on the same point remarked: "But there is a notion, which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by himself will make the otherwise lawful conduct unlawful. It would be rash to say that some as yet unformulated truth may not be hidden under this proposition. But, in the general form in which it has been presented and accepted by many courts, I think it plainly untrue, both on authority and on principle."

The Illinois appellate court[21] also declared the rule to be that "a person, with or without reason, may refuse to trade with another; so may ten or fifty persons refuse. An individual may advise his neighbor or friend not to trade with another neighbor. He may even command when the language amounts only to earnest advice."

This seems also to be the well established rule in other jurisdictions.[22]

As Affected by Nature of Act, Whether Exercise of Positive, or Common, or Qualified Right.

Under this doctrine, the lawfulness of a diversion of trade by labor organizations being determined by the application of principles similar to those applied to other classes of cases involving the exercise of what may be termed a common or qualified right, as distinguished from a positive right, it will not be amiss briefly to review the law relative to the exercise

[17] Straus v. American Publishers' Asso. 177 N. Y. 491, 101 Am. St. Rep. 819, 69 N. E. 1107, 64 L.R.A. 701; Mills v. United States Printing Co. 99 App. Div. 605, 91 N. Y. Supp. 185, citing the Cumming Case.

[18] Lindsay & Co. v. Montana Federation of Labor, 37 Mont. 264, 127 Am. St. Rep. 722, 96 Pac. 127, 18 L.R.A.(N.S.) 707.

[19] And see note in 16 L.R.A.(N.S.) 85.

[20] Vegelahn v. Guntner, 167 Mass. 92, 57 Am. St. Rep. 443, 44 N. E. 1077, 35 L.R.A. 722.

[21] Ulery v. Chicago Live Stock Exchange, 54 Ill. App. 233.

[22] J. F. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 Pac. 1027, 21 L.R.A.(N.S.) 550; Clemmitt v. Watson, 14 Ind. App. 38, 42 N. E. 367; Marx & H. Jeans Clothing Co. v. Watson, 168 Mo. 133, 90 Am. St. Rep. 440, 67 S. W. 391, 56 L.R.A. 951; Klingel's Pharmacy v. Sharp, 104 Md. 218, 118 Am. St. Rep. 399, 64 Atl. 1029, 9 A. & E. Anno. Cas. 1184, 7 L.R.A.(N.S.) 976.

of such rights by individuals. In the first place, it should be remembered that a positive right is the right of every individual to the exercise of the rights incident to the ownership of property and rights growing out of contractual relations, the general rule being that he cannot be called to account for any injury occasioned to others by the exercise of such rights without reference to his motive. There is, however, the right of every individual to pursue his labor, occupation, trade, profession, or business in common with others. This may be termed a common or qualified right. In the exercise of this right the individual cannot be held liable for injuries occasioned competitors by reason of any lawful means resorted to by him for the primary purpose of benefiting himself, such injuries not being a legal injury. He cannot, however, exercise this right, not for the primary purpose of benefiting himself, but for the malicious purpose of injuring another, and for injury so inflicted an action will lie.[23]

This doctrine may be illustrated by its application to malicious acts of individuals interfering with the property or business of another. Thus, an individual has been held liable for damages for maliciously firing on his own grounds near another's decoy for wild ducks, for the purpose of scaring away the ducks;[24] and for maliciously frightening rooks away from another's rookery;[25] also for maliciously preventing children from attending a private school, by violence and intimidation;[26] for maliciously firing a cannon at negroes to frighten them and thereby prevent them from trading with a competing trading ship;[27] and for maliciously setting up a competing barber shop for the purpose of drawing away another's customers;[28] also for maliciously driving away another's customers by threatening to sue them for infringement of patent;[29] and maliciously driving away another's customers by falsely misrepresenting his solvency;[30] for driving another's customers away by maliciously threatening to discharge them or procure their discharge;[31] and the malicious refusal by a theater company to book attraction of any company dealing with a competitor.[32] Such malicious acts, when done by the concerted action of many for the primary purpose of injuring another, rather than benefiting themselves, amount to a conspiracy.[33]

Malice is the Mere Test.

The foregoing authorities make it clear that a labor organization may become liable the same as an individual for any interference with the trade, occupation, or business of another, even though such interference is not accompanied with intimidation, coercion, or violence, if the primary object sought is the injury or destruction of such trade, occupation, or business, rather than to benefit the membership. But where violence, intimidation, or coercion other than such as may arise from the mere force of numbers is not resorted to, a labor organization is not liable for attempts by means of appeal, persuasion, etc., to divert the trade from one with whom they are having an

[23] Walker v. Cronin, 107 Mass. 555; Moores v. Bricklayers' Union No. 1, 23 Ohio L. J. 48; Mogul S. S. Co. v. McGregor [1892] 2 A. C. 47; dissenting opinion of Lord Penzance in Capital & C. Bank v. Henty, L. R. 7 App. Cas. 741; Tuttle v. Buck, 107 Minn. 145, 119 N. W. 946, 22 L.R.A.(N.S.) 599.

[24] Keeble v. Hickeringill, 11 East, 574, note.

[25] Hannam v. Mackett, 2 Barn. & C. 934.

[26] 11 Hen. IV.

[27] Tarleton v. M'Gawley, 1 Peake, N. P. 205.

[28] Tuttle v. Buck, supra.

[29] Stroud v. Smith, 194 Pa. 502, 45 Atl. 329.

[30] Brown v. American Freehold Land Mortg. Co. 97 Tex. 599, 80 S. W. 985, 67 L.R.A. 195.

[31] Graham v. St. Charles Street R. Co. 47 La. Ann. 1656, 49 Am. St. Rep. 436, 18 So. 707.

[32] Opinion of Spring J., in Roseneau v. Empire Circuit Co. 131 App. Div. 429, 115 N. Y. Supp. 511.

[33] Boutwell v. Marr, 71 Vt. 1, 76 Am. St. Rep. 746, 42 Atl. 607, 43 L.R.A. 803; West Virginia Transp. Co. v. Standard Oil Co. 50 W. Va. 611, 88 Am. St. Rep. 895, 40 S. E. 591, 56 L.R.A. 804; Erty v. Produce Exchange, 79 Minn. 140, 79 Am. St. Rep. 433, 81 N. W. 737, 48 L.R.A. 90; Hawarden v. Youghiogheny & L. Coal Co. 111 Wis. 545, 87 N. W. 472, 55 L.R.A. 828; Jackson v. Stanfield, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L.R.A. 588; Cleland v. Anderson, 66 Neb. 252, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 105 N. W. 1092, 5 L.R.A.(N.S.) 136; Temperton v. Russell [1893] 1 Q. B. 715; Klingel's Pharmacy v. Sharp, 104 Md. 218, 118 Am. St. Rep. 399, 64 Atl. 1029, 9 A. & E. Ann. Cas. 1184, 7 L.R.A. (N.S.) 976.

industrial controversy, where the primary object is to benefit themselves; the purpose being, not to destroy the business of the employer, but to divert the business to other employers who are employing members of the organization. And the fact that the business of the employer is seriously injured or ruined as a result of the acts of the union is not of itself sufficient to render their conduct actionable, the rights of the employer in this respect being a common or qualified right,—that is, the right to be protected in his business from the malicious acts of others in the exercise of their common or qualified rights, but not from injuries occasioned from the exercise of such rights for a lawful purpose.

In this connection it may be said that, while the mere fact of numbers engaged in diverting trade does not render a lawful act unlawful, yet that fact may be considered in determining whether the attempt to divert trade is for the lawful purpose of benefiting those engaged therein or for the malicious and unlawful purpose of injuring the business of the employer. On the other hand, and as an offset to any inference that might arise from the numbers engaged in an alleged boycott, it should be remembered that laborers engaged in at least the same character of labor, although for different employers and at different localities, are directly interested in a uniform scale of wages, hours of employment, etc., and hence are entitled by concerted action to refrain from purchasing the product of any employer not complying with such regulations. To a less degree, all laborers are likewise interested in the general maintenance of uniform wages, hours of labor, and other regulations. So, also, is the public at large interested therein, and are entitled to be informed relative to the merits of any controversy between employer and employee. And if the result of such information is the withholding of patronage from such employer, his injury is not a legal injury giving him any right of action for the damages so occasioned. As stated in a recent case:[34] "One may refuse to deal with a firm because of a belief that it does not give honest compensation for labor, and may ask his friends or the public to do the same thing; . . . labor has a right to organize; . . . labor has the right to appeal to the community, and say, 'Don't patronize this man, because he does not sympathize with organized labor.' "

[34] People v. Radt, 15 N. Y. Crim. Rep. 174, 71 N. Y. Supp. 846.

Employers' Liability and Compensation Legislation

BY HON. CYRUS W. PHILLIPS

Member of the New York Assembly from Rochester and of the Employers' Liability Commission, who introduced in the Assembly the bills recommended by the Commission.

THE AUTHOR

BY the enactment of the workmen's compensation act at the last session of the legislature, New York state has adopted the principle that industrial accidents not due to the wilful misconduct of the employee ought to be compensated, and the burden cast upon the industry, instead of being left, as at present, in most cases, upon the injured workman or his family. Most of the European countries have discarded the doctrine that workmen should be compensated for injuries only when there has been negligence on the part of the employer or his representatives, and have adopted in its place various systems of compensation. New York legislation consists of two statutes: One, amending the employers' liability act, and providing an optional scheme of compensation which comes into operation upon the filing with the county clerk of a consent signed by the employer and the consenting employees. The other statute provides a mandatory scheme of compensation for accidents occurring in certain specified dangerous employments.

Before discussing the compensation features of these statutes, it may be well to refer to the amendments to the liability law, as this law will have general application outside of the trades referred to as dangerous, except where the optional plan has been adopted by an employer and his workmen.

The clause in the employers' liability act which makes the employer liable for any defect in the condition of the ways, works, or machinery is broadened by including therein the word "plant." And where an employer enters into a contract with an independent contractor to do part of such employer's work, or a contractor enters into a contract with a subcontractor to do part of the work comprised in the contractor's contract, the employer becomes liable for injuries to the employees of the contractor or subcontractor if such injuries are caused by any defect in the condition of the ways, works, machinery, or plant, furnished by or belonging to the employer provided the defect arose or had not been discovered, or remedied through the negligence of the employer or of some person intrusted by him with the duty of seeing that they were in proper condition.

That portion of the liability act which declared an employer liable for the negligence of any person in his service intrusted with and exercising "superintendence, whose sole or principal duty is that of superintendence, or, in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer," is amended so as to make the employer liable for the negligence of any person intrusted with "any superintendence, or by reason of the negligence of any person intrusted with authority to direct, control, or command any employee in the performance of the duty of such employee." The provision of the statute requiring an employee to serve upon the employer notice

of the accident is amended by declaring that the failure of the employer to serve a written demand for a further notice shall constitute a waiver of all defects that the notice may contain.

The original employers' liability act attempted to modify the assumption-of-risk rule by declaring that the question whether the employee understood and assumed the risk of injury by his continuance at his work with knowledge of the risk of injury should be one of fact, but subject to the usual powers of the court, in a proper case, to set aside a verdict rendered contrary to the evidence. This provision is amended in the new act, by striking out the language used, and providing in place thereof that, in case of a personal injury "for which the employer would be liable but for the hitherto available defense of assumption of risk by the employee, the fact that the employee continued in the service of the employer, in the same place and course of employment, after the discovery by such employee, or after he had been informed of the danger of personal injury therefrom, shall not be, *as matter of fact or as matter of law*, an assumption of the risk of injury therefrom."

The burden of proving contributory negligence is shifted from the plaintiff to the defendant by a provision declaring that, "on the trial of any action brought by an employee or his personal representatives to recover damages for injuries arising out of and in the course of such employment, contributory negligence of the injured employee shall be a defense to be so pleaded and proved by the defendant."

The statutes authorizing compensation from the employer, without regard to the question of negligence, provide a schedule of compensation hereafter referred to and are optional in all occupations except the following, in which their requirements are made mandatory:

1. The erection or demolition of any bridge or building in which there is, or in which the plans and specifications require, iron or steel frame work.

2. The operation of elevators, elevating machines, or derricks or hoisting apparatus used within or on the outside of any bridge or building for the conveying of materials in connection with the erection or demolition of such bridge or building.

3. Work on scaffolds of any kind elevated 20 feet or more above the ground, water, or floor beneath in the erection, construction, painting, alteration, or repair of buildings, bridges, or structures.

4. Construction, operation, alteration, or repair of wires, cables, switchboards, or apparatus charged with electric currents.

5. All work necessitating dangerous proximity to gunpowder, blasting powder, dynamite, or any other explosives, where the same are used as instrumentalities of the industry.

6. The operation on steam railroads of locomotives, engines, trains, motors, or cars propelled by gravity or steam, electricity or other mechanical power, or the construction or repair of steam railroad tracks and road-beds over which such locomotives, engines, trains, motors, or cars are operated.

7. The construction of tunnels and subways.

8. All work carried on under compressed air.

These occupations are declared by the statute as being "hereby determined to be especially dangerous, in which, from the nature, conditions, or means of prosecution of the work therein, extraordinary risks to the life and limb of workmen engaged therein are inherent, necessary, or substantially unavoidable, and as to each of which employments it is deemed necessary to establish a new system of compensation for accidents to workmen."

An employee injured under such circumstances as to bring him within the provisions of the mandatory compensation act may, after the accident, either accept the compensation prescribed, or waive that and sue under the employers' liability act. He must, however, make his election, and, having commenced either proceeding, he waives his rights under the other.

Under the optional compensation plan, the employee, by consenting to the plan, waives all future rights under the liability act, and is limited to the compensation prescribed in the schedule, unless the accident is due to serious or wilful mis-

conduct of the employer; while the employer, by consenting to the plan, becomes bound to pay the compensation fixed, unless the injury is due to the serious and wilful misconduct of the employee. And the failure of the employer to make his weekly payments promptly renders him liable to an action on contract, in which the judgment, if one is recovered, shall be for a lump sum equal to the amount of the payments "then due and prospectively due under the plan."

The scale of compensation under both the optional and mandatory plan consists of four years' wages, not to exceed $3,000, in case of death, and 50 per cent of the workman's average weekly earnings in case of total incapacity for a period not to exceed eight years, and 50 per cent of the difference between the average weekly earnings before the accident and the average weekly earnings after the accident during the continuance of partial disability, not to exceed eight years.

Claims of attorneys for contingent interests in recoveries under the compensation features of the statutes are not to be enforceable liens upon the fund recovered, unless approved by a judge.

The settlement of disputes arising under the compensation provisions is to be determined either by agreement or by arbitration, as provided in the Code of Civil Procedure, or by an action at law, to recover as on a contract the weekly or death benefits, and the right to trial by jury is retained.

The laws are the result of an investigation carried on by a commission created under a law passed at the previous session of the legislature.

It is not claimed that they solve the problem involved, but they commit the state to a new policy and point the way to an ultimate solution.

The constitutionality of the mandatory provisions are, of course, open to question. It is contended that, to make an employer liable for an accident inherent in the nature of the work, and one which he and his servants could not have prevented, constitutes a taking of property without due process of law. On the other hand it is asserted that the state, in the exercise of its police power, can require an employer carrying on a hazardous occupation which is bound to destroy lives and limbs, to make some compensation for the inevitable result of the carrying on of such trade.

The constitutionality of the principle embodied in a mandatory compensation act has never been passed upon by the courts. The trend of public opinion is in favor of the adoption of such statutes. New York has declared in their favor and has made it possible for their constitutionality to be determined. Employers' associations, labor unions, civic societies, and publicists are working on the problem. That it will be ultimately solved, and along lines radically different from the present system, seems certain.

Compulsory Arbitration of Strikes and Lockouts*

BY HONORABLE JOHN GIBBONS
Judge of Circuit Court of Cook County, Ill.

THIS is a government of law, not of force. The theory of our government is based upon the idea that its laws are in a measure self-executory, for each citizen is deemed a guardian of the state and conservator of the peace. There is but one law for the native-born and the stranger, the rich man and the poor. No man, however powerful, and no class of men, however numerous, can be above the law or beyond it. The law sanctions the largest liberty of the individual consistent with the safety of the state. There is no liberty without law. That which men call liberty outside the law means license, which is the twin fury of anarchy.

Necessity of Legislation.

The tyranny of capital must be extirpated, and the thraldom of trades unions abolished. This cannot be effected through strikes and lockouts, nor by increasing the army and navy. It cannot be accomplished by mandates and injunctions of courts, the issuance of which, perhaps, is beyond the scope of their authority. The only solution under existing circumstances is through legislation. This can be effected when our lawmakers comprehend and appreciate the gravity of the situation, and enact just and salutary laws to regulate the actions of men in every legitimate pursuit of life, and create tribunals with powers adequate to the enforcement of such laws.

Then would we witness the passing of the lockout and the strike, with all the distress and disaster that characterize their pendency.

Until we reach that higher plane in the march of civilization where man's duty to God and to his fellow man will be the motive and measure of human effort, there can be no effective solution of the vexing problems which now confront us as a people, outside the law; and it is worse than criminal for our legislators to neglect the enactment of appropriate measures for the speedy adjustment, by the courts, of these contentions so seriously affecting the public peace and the stability of our institutions.

Compulsory Arbitration.

There seems to be a consensus of opinion among the wise and thoughtful of to-day that in arbitration—voluntary or compulsory—must be sought the settlement of these perplexing questions; and the former having so frequently and utterly failed to effect the required results, there exists imperative necessity for resorting to the latter.

Arbitration Tribunal and Procedure.

If arbitration is made compulsory and the decree of the arbitrators enforced, the manner of creating the tribunal clothed with jurisdiction to hear and determine the issues is of vital importance. There is no serious objection to be urged against the appointment by the governor of three

*From the author's copyrighted work entitled "Tenure and Toil." Published in CASE AND COMMENT by special permission.

competent persons as a board of arbitration and conciliation, similar to the Massachusetts plan, one of them to be an employer of labor, one an employee connected with some labor organization, and the third to be appointed on the recommendation of the other two, should they unite in such recommendation within a specified time after their appointment, and in case they did not that he be appointed by the governor on his own motion. It should be the duty of this board, whenever any controversy not involving questions of a private contractual nature exists between an employer and his employees, if he employ twenty-five or more persons, to visit the locality, make careful inquiry into the cause, hear all persons interested, and, if the matter in dispute cannot be amicably and speedily adjusted, to take the testimony in writing of a limited number of witnesses, from which to make findings of fact. The findings of fact so made should be presented to a judge of the circuit court, or other court of general jurisdiction, who should render judgment thereon in legal form, such judgment to be binding upon all parties to the controversy, unless annulled or modified as herein suggested.

If either party considered the findings of fact unwarranted by the evidence, he should be privileged to petition the chief justice of the supreme court of the state to appoint three judges of the circuit or other court of general jurisdiction, not elected in the county wherein the controversy arose, to meet at a time and place to be designated by him, to examine the evidence anew, determine for themselves the questions of fact and law, and reverse, modify, or affirm the judgment in such manner as to them should appear just and equitable. The decision of the judges so named, or any two of them, should be final and conclusive, and binding upon the parties interested, under the particular issues involved, until such a time as it could be shown that new conditions have arisen which would authorize a modification of the decree.

Until after the announcement of such a decision, it should be unlawful for the leader of any combination of men, or of the men themselves, to order a strike, and any person offending should be adjudged guilty of misdemeanor, and subject to fine or imprisonment, or both, according to the circumstances; and it should also be made unlawful for any corporation or individual to order a lockout, the penalty for so doing to be the payment of full wages to the men affected by such lockout, and in addition thereto the recovery of a certain sum named in action of debt for the use of the school fund, or for such other public use as may be designated. The decree of this tribunal ought to be an alternative one. The employer might pay the wages decreed to be just, or he might close his factory, but he would not be allowed to continue operations and employ cheaper labor. On the other hand, the laborer could take the established wages or quit the employment, but he could not, directly or indirectly, afterwards interfere with the business of his employer.

Enforcement of Decree.

It is claimed by many that the decree of a tribunal of this nature could not be enforced, and that the only object of such a law should merely be the creation of a forum which would ascertain the causes which give rise to threatened difficulties, and declare its conclusions, the efficacy of which would wholly depend upon whether or not the party adjudged to be in fault could sustain itself against a judicial finding that it was in the wrong. I was inclined to this view at one time, but after careful investigation and mature reflection I am convinced that the decree of such a tribunal ought to be and could be enforced in the manner customarily followed in the enforcement of other decrees.

Should it be urged that there are in this country individuals and corporations, some of whom employ as many as ten thousand operatives, persons and corporations whose wealth is counted by tens of millions, and that it would be impossible to enforce a decree compelling such corporations or individuals to operate their works and pay their employees the higher scale of wages fixed by the decree, unless they chose to do so, and that it would be impracticable to compel ten thousand men to go to work at lower wages fixed by the decree if they refused

to do so,—to all such objections I would answer that the state in its organized capacity, whose duty it is to enforce laws for the well being of the whole people, is greater than any man or set of men whoever they may be. To deny the power of the state to enforce such a decree is to assume that the magistrate no longer holds the sword of justice, and that the right to redress grievances and punish offenders is lodged in the hands of individuals. It is to assume and affirm that resentment is the sole motive for prosecuting offenders against the public peace, and to gratify passion is the chief end of punishing them. It is to assume and affirm that he who suffers a wrong is the only person who has the right to pursue the aggressor, and to exact or remit the punishment. In a word, it is to assume and to affirm that the labor organizations and the money barons of the twentieth century are above the law, possessing a right to engage in incessant and murderous private warfare against each other, like their prototypes of the middle ages waged when they set at defiance the mandates of kings, and listened unmoved to the anathemas of the Vatican—that, after all, our loudly vaunted civilization is but the shadow of the substance which was so dearly won, and which once we prized so well.

It is unnecessary here to refer to the minor details of the proposed system. These can be depended upon to find ready adjustment if the plan itself be accepted as practicable.

Arbitration the Hope of the Future.

Arbitration should enter as an important element into any system that may be adopted. It has the approval of time. From the earliest ages it has opened the way to peace in controversies between men and nations. It is the hope of civilization in turning the sword into the ploughshare, and enmity into toleration and charity. Often has it averted war, many bitter quarrels has it transformed into amicable alliances. When selfishness rejects arbitration it invites violence. As the dispenser of peace and justice it should be welcomed into the settlement of contentions between capital and labor. Vitalized by the enactments necessary to give it a legal entity, it would soon become recognized as the one agency, benign and potential, for harmonizing and adjusting all the relations and differences between employer and employee.

Integrity of Our Courts.

The courts of the country have, even in the most venal period of the nation's history, remained pure and incorruptible, and our judges, whether dependent upon popular favor for the offices they held, or appointed by the executive, have had the courage to do right, and to decide great public questions in accordance with their convictions of justice, regardless of personal considerations. Hence it is that the great majority of the people, with reason, have every confidence in the integrity of the judiciary. From the days when St. Louis of France sat beneath the spreading tree in the courtyard of his palace to hear the appeals of his people, and to modify and revoke the judgments of the relentless barons of those times, the courts have always been the guardians of the rights and privileges of the poor, the unswerving friends of the oppressed.

The Use and Abuse of Injunctions in Labor Controversies

BY HONORABLE CHARLES E. LITTLEFIELD
of New York, formerly Representative in Congress from Maine.

IN the matter of the use and abuse of injunctions in labor controversies, so much is repeatedly and insistently said, and so vigorously have the courts been denounced, that I think it may be safely said that the impression generally prevails that there has been and still is more or less abuse of judicial discretion in controversies of that character. I am free to admit that, in a general way, I entertained that impression myself, until I made the investigation to which I shall now refer.

The assertions have hitherto been general and indefinite in character. It seemed to me that it was both wise and proper that the parties making these assertions and engaged in wholesale denunciations of the courts should be required to specify the instances of abuse, and call attention to the circumstances under which they claim judicial discretion has been abused, and the power of granting injunctions in labor controversies has been oppressively or improperly exercised.

With that in view, on the 5th of Ferruary, 1908, when Mr. T. C. Spelling, the attorney representing the American Federation of Labor, appeared before the Judiciary Committee of the House of Representatives of which I was then a member, to urge the enactment of the Pearre bill, I took occasion to ask Mr. Spilling if he would be kind enough to specify the cases of injunctions where abuses had occurred, and point out the circumstances connected therewith, also to give a list of cases where injunctions have been improperly issued. Mr. Spelling replied that there were a great many such cases, and that he would furnish the required information or have it done. It is proper to remark that Mr. Spelling did not file a single one of "the great many cases" he claimed existed.

Mr. Gompers, who appeared before the committee, was also requested to put in all such injunctions, in full, involving abuses of the judicial power, with reference to the cases complained of. Mr. Gompers appeared on the 24th of February, 1908, and was requested to file everything he had in that line, but nothing was filed with the committee until about the 6th or 7th of May, when a mass of material, some of it relating to state injunctions, some of it having no connection with injunctions, some of it being injunction orders and opinions relating thereto, was filed. No criticism of any injunction, order, or decree was filed with this material, and, although I specifically requested the gentlemen representing this organization to file with the other *data* such criticism as they had to make of these injunctions or orders, they absolutely declined to file any criticism whatever.

The papers thus filed show only twenty-three decisions, orders, or complaints, beginning with an injunction issued December 19, 1893, by Judge Jenkins, in the case of the Farmers' Loan & T. Co. v. Northern P. R. Co. (4 Inters. Com. Rep. 744, note 60 Fed. 803, 25 L.R.A. 414, note) being the celebrated Jenkins Case, involving the Order of Railway Trainmen.

The abstract covers only the Federal cases, as the Judiciary Committee had no concern whatever with the action of the state courts, as they have no effect whatever on Federal legislation, and it was only proposed Federal legislation that the Committee considered. Of these twenty-three decisions, two are of the supreme court of the District of Columbia,—Bender v. Union (Jan. 10, 1908),

and the Bucks Stove & Range Co. v. American Federation of Labor (Dec. 17, 1907), 36 Wash. L. Rep. 822.

In the Bucks Stove & Range Case, notice of the motion for preliminary injunction was given two and one half months before the motion was heard. The motion was fully argued, and the judge held the case under advisement for a month, and then made the order for the preliminary injunction to issue, and filed an able and courageous opinion, giving his reasons therefor. The case was set down for a hearing about two months after this order, and on the motion to make the injunction permanent the defendants did not contest the decree, which was made final without argument or criticism. In this case the American Federation of Labor was represented by eminent counsel, Honorable Alton B. Parker appearing for the respondents; and it was probably under his advice that the matter was not contested further,—a very significant and approving commentary upon the propriety of the order for a preliminary injunction issued by Mr. Justice Gould.

In the Bender Case, after notice and full argument, the court declined to issue a preliminary injunction. The matter was then carried forward and heard on the pleadings and proofs, on motion for a permanent injunction, which motion the court granted. After full argument the court took the matter under advisement, and then ordered a final writ of injunction to issue. From this decree the respondents entered an appeal. This appeal has since been withdrawn. Such withdrawal operates as a confession by respondents that their case upon the facts was hopeless and unworthy of further contention. If these two cases are characteristic of the twenty-three, they are all above criticism.

Two of these cases (Boyer v. Western U. Teleg. Co. 124 Fed. 246, and Platt v. Philadelphia & R. R. Co. 65 Fed. 660) are denials of petitions for restraining orders by labor unions against employing corporations. These are certainly not instances of abuse of the exercise of judicial discretion in the granting of an injunction, but are rather complaints because the court refused to exercise its discretion in the way desired by the union, and certainly constitute no argument for legislation restricting the power of the courts in that regard.

Another case, that of Grand Trunk R. Co. v. Gratiot Lodge (August 23, 1905), comprises merely a complaint and order to show cause, no restraining order appearing.

The remaining eighteen cases are injunction orders issued by the circuit courts of the United States from December 10, 1893 (the Jenkins Case, above referred to), down to and including the restraining order in the case of the Hitchman Coal & Coke Co. v. Mitchell (Cal.), November 27, 1907.

In fifteen of these eighteen cases *ex parte* restraining orders were issued, including two injunctions applied for by receivers (Ames v. Union P. R. Co., January 27, 1894, and Farmers' Loan & T. Co. v. Northern P. R. Co. 4 Inters. Com. Rep. 744, note, 60 Fed. 803, 25 L.R.A. 414, note).

Two of these fifteen restraining orders (Wabash R. Co. v. Hannahan, 121 Fed. 563, and the order issued on the original bill in Allis-Chalmers Co. v. Iron Moulders' Union No. 125, 150 Fed. 155) were dissolved and motion for preliminary injunction denied on the hearing on the merits of the case.

In Kemmerer v. Haggerty (139 Fed. 693), also one of these cases, the restraining order was vacated for lack of jurisdiction over the parties, and the court did not, therefore, go into the merits.

In the celebrated Jenkins Case the judge has been vigorously assailed for his action, and in connection therewith was threatened with impeachment proceedings before the Judiciary Committee of Congress. In this case the Northern Pacific Railway Company having gone into the hands of receivers, two days after their appointment a reduction of from 10 to 20 per cent was ordered in the salaries of employees. The employees threatened to strike to prevent the carrying out of this order, and the receivers applied to the court to restrain the men from executing their threat. Judge Jenkins issued a preliminary injunction containing the following clause:

"And from ordering, recommending,

approving, or advising others to quit the service of the receivers of the Northern Pacific Railroad on January 1, 1894, or at any other time."

Judge Jenkins subsequently modified the preliminary injunction by striking out this clause. This case was carried on appeal from his refusal to further modify his injunction to the circuit court of appeals. The opinion of the court of appeals was drawn by Mr. Justice Harlan, of the Supreme Court of the United States.

Mr. Justice Harlan discussed the issues in an elaborate and exhaustive opinion. It appears that it was contended on appeal that the circuit court exceeded its powers when it enjoined the employees of the receivers "from combining and conspiring to quit, with or without notice, the service of said receivers, with the object and intent of crippling the property in their custody or embarrassing the operation of said railroad, *and from so quitting the service of said receivers, with or without notice, as to cripple the property or prevent or hinder the operation of said railroad.*"

The court held that this clause embodied two distinct propositions,—one relating to combinations and conspiracies to quit the service of the receivers, "with the object and intent of crippling the property . . . or embarrassing the operation of the railroads in their charge;" the other having no reference to combinations and conspiracies to quit, or to the object and intent of quitting, but only to employees "so quitting" as to "cripple the property or prevent or hinder the operation of the railroad."

The court held that the court below (Judge Jenkins) should have eliminated from the writ of injunction the words: "And from so quitting the service of said receivers, with or without notice, as to cripple the property or prevent or hinder the operation of said railroad," but upheld the injunction in all other respects.

On the question of the distinction between the two propositions, the court said, after having called attention to the fact that the employees as a body had a right to demand given rates as a condition for their remaining in service, and to withdraw from service if it was not granted to them, without reference to the effect upon the property or upon the operation of the road:

"But that is a very different matter from a *combination and conspiracy* among employees, with the *object* and *intent*, not simply of quitting the service of the receivers because of the reduction of wages, but of *crippling the property* in their hands and *embarrassing the operation* of the railroad."

In his order modifying the injunction, and the reasons given therefor, Mr. Justice Harlan simply emphasizes the familiar and well-established distinction between acts done or strikes inaugurated in pursuance of and for the purpose of carrying out a conspiracy, and such acts entirely disconnected with such conspiracy.

Of the remaining eleven cases there was no contest in seven of them, nor any demand of any kind made to modify or vacate the restraining order by the defendants.

In the remaining four cases, preliminary injunctions in the terms of the restraining order were granted in three instances, after hearing and argument.

The most recent of these instances, that of the Hitchman Coal & Coke Company v. Mitchell and als., requires more than a passing notice. This is the case where an injunction was issued by Judge Dayton, of West Virginia, which has been the subject of considerable public criticism, resulting in the publication in the Congressional Record of the injunction order; and the judge has been subjected, with reference thereto, to more or less vigorous aspersion, not only on the part of members of Congress, but upon the part of men occupying important executive office.

A brief statement of the facts will, in my judgment, show that the action of Judge Dayton in this case was absolutely justifiable, and a proper and necessary exercise of his judicial discretion in the protection of the rights of the parties concerned.

It seems that the Hitchman Coal & Coke Company were the owners of about 5,000 acres of coal; that its plant was equipped with apparatus and facilities which enabled it to produce about 1,400

tons a day; that it necessarily had large contracts for future delivery to practically the full amount of its capacity. That prior to April 1, 1906, they operated their mines by men who were affiliated with the United Mine Workers of America; that on April 1, 1906, a strike was ordered by that association, and that their employees, being members thereof, went out on a strike by virtue of that order, not because there was any controversy between them and their employers, or any dissatisfaction with reference to their employment. On the contrary, they distinctly stated that they had no grievance against the Hitchman Coal & Coke Company, but went out on a strike because coal operators in other sections of the country had refused to accede to certain demands of the association. And although the Hitchman Coal & Coke Company offered to pay them any advance in wages after April 1, 1906, that might be agreed to as a result of the strike, in connection with other coal operators (if their operators and employees would continue with the work), these members of the United Mine Workers of America were ordered by the gentleman in charge of the union to strike, and did strike, notwithstanding their willingness to agree to accept such proposition.

Under these circumstances the operations of the Hitchman Coal & Coke Company were arbitrarily suspended for about two months, at the end of which time, not being able to get union men, they began to employ men not members of the union, requiring them to contract with them not to join the United Mine Workers of America, and confined their employment to nonunion men. Having found it impossible to rely with confidence upon the United Mine Workers for effective service, they were compelled to avail themselves of nonunion labor, and endeavored to protect themselves in its employment by this contract, which, under the circumstances, was not only a wise precaution, but a clear exercise of their legal rights.

Later, the United Mine Workers of America, by their combination, confederation, and conspiracy, endeavored to compel them to reunionize their works, to employ only members of the Mine Workers' Union, to discharge their nonunion labor that they had found it necessary to thus employ in order to continue their operations, and, as the principal and salient feature of this conspiracy, to induce the nonunion employees of the plaintiff, by threats, intimidation, or persuasion, to violate the contract they had made with the plaintiffs, at the time of their employment, not to join the union, and to induce them to join the union in violation of such contracts, without the consent and against the protest of the plaintiff.

Under these circumstances Judge Dayton issued his temporary order restraining the defendants from combining and conspiring to interfere with the employees of the plaintiff for the purpose of unionizing the plaintiff's mine without the plaintiff's consent, and from inducing their employees to violate their contracts entered into by them when they entered the service of the plaintiff, and containing other provisions of a similar character. In other words, he issued a restraining order for the purpose of protecting the plaintiffs in the exercise of their rights to employ such labor as they saw fit to employ, and of the making and maintenance of such contracts as expensive experience had shown them the exigencies of their business required, and to prevent them from being compelled by intimidation, threats, or otherwise to discharge their nonunion labor, to reunionize their works, to rely again solely upon union labor, and thus completely subordinate their investments to the interests of union labor and its absolute control.

It was a perfectly proper exercise of the judicial power, and the plaintiffs were entitled to the protection of the court in that regard.

It was in accordance with well-settled principles, and is sustained by the highest authority. The law recognizes the inviolability of the right of contract, and courts of equity will protect that right against conspiracies on the part of third parties to induce one of the parties to break the contract to the injury of the other.

In Bitterman v. Louisville & N. R. Co. 207 U. S. 205, 52 L. ed. 171, 28 Sup. Ct.

Rep. 91, 12 A. & E. Ann. Cas. 693 (which was a case between the railroad company and a scalper, and involved a contract which made a ticket not transferable by the purchaser), the court held that an actionable wrong is committed by one who "maliciously interferes in a contract between two parties," to induce one of them to break that contract to the injury of the other, and restrained a conspiracy to engage in the sale of such railroad tickets, which involved the inducing, by the scalper, of the violation of the contract upon the part of the purchaser, and held that it was not necessary, in order to justify an injunction to restrain the carrying out of such a conspiracy to thus induce one party to violate his contract with another, that the conspiracy should "involve the ingredient of actual malice in the sense of personal ill will." The wanton disregard of the rights of the contracting party, causing injury to the party by the violation of the contract, was a sufficient justification for the issuance of the writ restraining the carrying out of such a conspiracy.

This is precisely in point, sustaining Judge Dayton's order upon the crucial point involved in the case.

It was also precisely in line with the remarks made by Judge Gray in his celebrated decision in the anthracite coal strike case, concurred in by every member of the Commission, which included not only Judge Gray, but Carroll D. Wright, John M. Wilson, John L. Spalding, Edgar E. Clark, Thomas H. Watkins, and Edward W. Parker (one of whom, Mr. Clark, was a specific representative on the commission of organized labor). Judge Gray said:

"Our language is the language of a free people, and fails to furnish any form of speech by which the right of a citizen to work when he pleases, for whom he pleases, and on what terms he pleases can be successfully denied. The common sense of our people, as well as the common law, forbids that this right should be assailed with impunity. . . . The right thus to work cannot be made to depend upon the approval or disapproval of the personal character and conduct of those who claim to exercise this right. If this were otherwise, then those who remain at work might, if they were in the majority, have both the right and power to prevent others who choose to cease work from so doing.

"This all seems too plain for argument. Common sense and common law alike denounce the conduct of those who interfere with this fundamental right of the citizen. The assertion of the right seems trite and commonplace, but that land is blessed where the maxims of liberty are commonplaces."

The right to work and the right to employ are very obviously correlative rights. The right that the Hitchman Coal & Coke Company were asserting in their application to Judge Dayton for an injunction was simply the right defined by Judge Gray in this decision, and that was the right to employ whom they liked, when they liked, and how they liked. And this right, it may be said, has been distinctly sustained by the Supreme Court of the United States in the Adair Case.

It should be repeated and emphasized that the employees of the Hitchman Coal & Coke Company who were to be displaced by union labor were under specific and express contracts, and that a conspiracy to induce the violation of such contracts has always been held to be restrainable as an infringement of a clear legal right. The authorities are innumerable in sustaining this proposition, and no authority can be found that denies it, and it should be remembered that Judge Dayton's order in this particular case was expressly predicated upon the knowledge of the defendants of the existence of such contracts, and their deliberate purpose to induce their violation.

This was one of the grounds upon which the court proceeded in the case of Thomas v. Cincinnati, N. O. & T. P. R. Co. (4 Inters. Com. Rep. 788, 62 Fed. 803), in which the able opinion was drawn by Honorable William H. Taft, and the action of Judge Taft in this case is a specific precedent on all fours justifying the action of Judge Dayton in issuing this injunction. He said: "The breach of a contract is unlawful. A combination with that as its purpose is unlawful and is a conspiracy."

In the remaining three injunctions of

the eighteen to which I have referred, in the case of the Rocky Mountain Bell Teleph. Co. v. Montana Federation of Labor (156 Fed. 809), a restraining order was issued after notice of motion and hearing.

In the case of the Allis-Chalmers Co. v. Iron Moulders' Union No. 125 (150 Fed. 155), a preliminary injunction was granted after filing of supplemental bill and after motion, hearing, and argument.

In the case of Newport Iron & Brass Foundry Co. v. Iron Moulders' Union (September 27, 1904), the record does not disclose whether or not the restraining order was issued before the final decree.

Thus the papers filed with the committee show eighteen restraining orders of the circuit courts of the United States, covering a period of fourteen and a half years, only one of which has been modified by an appellate court.

While I have no complete injunctions that have been issued by Honorable William H. Taft while he was a circuit judge, it is well known that they are generally held in high esteem, and of the orders in the cases filed with the committee there are none which differ substantially from the orders of injunction, so far as I have been able to ascertain, issued by this distinguished judge in Thomas v. Cincinnati, N. O. & T. P. R. Co. (4 Inters. Com. Rep. 788, 62 Fed. 803), or Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. (5 Inters. Com. Rep. 522, 54 Fed. 730, 19 L.R.A. 387), so far as these orders appear to be stated in the opinions rendered in the course of the decision.

In the Thomas v. Cincinnati Case, as an illustration, the defendant, Phelan, was enjoined "from, either as an individual or in combination with others, inciting, encouraging, ordering, or in any other manner causing the employees of the receiver to leave his employ with intent to obstruct the operation of his road, *and thereby compelling him not to fulfil his contract* and carry Pullman cars."

Before leaving the list of the cases filed by Mr. Gompers with the committee, attention should perhaps be called to one other case, that of the Reinecke Coal Min. Co. v. Wood (112 Fed. 477). Under the circumstances disclosed in that case, the defendants and others had invaded the Hopkins district in great force, establishing armed camps in the vicinity of the nonunion mines, which were maintained for many months, and the roads patroled and the approaches to the mines picketed for the purpose of coercing and intimidating miners to join the union and cause a strike unless the union scale was adopted. Nonunion men were constantly threatened and assaulted, and when defensive measures were adopted there were constant collisions and disorders.

The court found that the conditions sought to be brought about were—

"Undesired and vigorously repelled by the employers and a vast majority of the employees" . . . and said: "If this court cannot in a case like this protect the rights of a citizen when assailed as those of the complainant have been in this instance, there is a decrepitude in judicial power which would be mortifying to every thoughtful man."

Some of the cases submitted present a graver condition even than that of the Reinecke Coal Mining Company Case. I do not go so far as to say that all of the eighteen cases of injunctions and restraining orders submitted by Mr. Gompers are parallel in all respects to the Reinecke Coal Mining Company Case, or the Hitchman Coal & Coke Company Case, or the Western Coal Min. Co. v. Puckett (November 21, 1899), or the Telephone Case; but in the absence of any specific criticism on their part, I do say that I have not been able to find any out of the eighteen submitted by them that are the proper subject of legal criticism. If there are any facts involved in any of the cases that subject the action of the court in entering the decrees to proper criticism, these facts have not been called to our attention. And upon the face of the papers submitted to us, instead of the cases showing an abuse of the power of injunction, they would show its reasonable and legitimate exercise, and are only subject to criticisms upon the ground that any use whatever of the power of injunction is understood by the labor organizations to be an abuse of judicial power.

The Lawyer's Words

BY ALBERT S. OSBORN

Author of "Questioned Documents"

[There are many books in which lawyers have spoken to lawyers on the conduct of trials and the art of persuasion. Mr. Osborn's article is novel in that it treats these questions from the view point of one who has participated in many trials as an expert in handwriting.—Ed.]

THOSE who have the opportunity of hearing numerous cases tried in various courts, in different localities, must observe the widely varying scale of quality in law practice, a variation wider perhaps than in any other profession. It ranges from the sometimes unappreciated but masterly skill of the legal artist down to the bungler who does not know law or men and cannot express what he does know. It has been suggested that if clients really knew how badly their cases had been tried they would endeavor in many instances to develop a new class of law work under the general head of "malpractice."

The trial of a suit at law is an intricate, difficult intellectual performance, so poorly done so many times perhaps because those who pay the bills may be no better judges of its real quality than they would be of the comparative merits of ancient Greek art. Counsel are praised for fatal errors and blamed for doing the right thing. Litigation with the average citizen is only occasional,—happy for him that it is,—which may account for his inability to judge of its quality.

Much of the difference in law practice arises from varying degrees of skill in the effective use of language. Ideas must, of course, come first, but words are in fact the lawyer's tools; with them he achieves success, or because of them meets defeat. Old-style oratory in courts of law has gone out of fashion, but words still represent or misrepresent ideas; and the planting of ideas is the important part of the work of the lawyer.

In the old days the courthouse was famed for ear-splitting oratory and fiery rhetoric, and the country people came for miles to hear the lawyers "sum up." Law practice has not deteriorated, but results are now obtained in a somewhat different way and with less noise, but words are still the principal medium by which mind communicates with mind. Language, however, is now used rather to persuade than to thrill and to entertain, and the high art of persuasion might well form a definite part of every lawyer's course of study.

A familiar acquaintance with Plato and that famous old teacher of his has helped many who would learn to convince; and full of suggestion is Franklin's quaint recital of how he improved himself in the art of leading others to see as he saw, and thus, as he modestly says, qualifying himself to be of some little use to his country.

As was said of Webster's words, in the right place a word may weigh a pound, but it must be the right word, and yelling will not make up for poor selection. It is said there are really no synonyms, and of this we are convinced when we hear a thought appropriately expressed. There must be thought first, but alas! there may be thought without effective expression, as well as empty words.

Often the most effective part of an argument is a skillful inquiry,—a Socratic question that penetrates to the very heart of a subject, and serves to put in motion the receiving mind that is being worked upon; then a statement with just the proper emphasis gains admission almost unawares, and an idea is planted in the mind of another. The whole operation is like the skilful playing of a delicate and complicated instrument, that requires not only knowledge of the subject, but knowledge of the instrument.

A very useful course of training for a lawyer would be something equivalent to a season of actual practice in difficult salesmanship. Let the lawyer who seeks to completely prepare himself for his most important and difficult work take the temporary agency for some poor-selling book, and in this way make a practical study of the entrances to the human mind. Perhaps one of the first things he will learn is that it is possible to antagonize people by one unfortunate sentence, and he may discover that there is such a thing as a right and a wrong order of statements. He may learn that it is not simply necessary to say it all, but that he must say first what should be first said, or it will not be necessary to say anything at the last. It is easy enough to see that some lawyers have never attempted to sell goods, or, perhaps having failed in the attempt, they have then become lawyers.

The citadel of the mind may be captured in more ways than one, but an entrance is not often gained without a proper approach. The first sentence of an argument is often the most important sentence because it is the first. By it interest is kindled, suspicion disarmed, and confidence awakened; or antagonism aroused, and a prejudice created that cannot be overcome. The mind opens or shuts according to the hailing sign given; the truth may be told in such a way that it is not believed.

There are, no doubt, certain laws of persuasion that underlie successful argument. Might not one of them be that it is not well to attempt to put an idea full grown and complete into the mind of another, but, rather, that it should be skilfully planted, and then tended and nurtured with rich words until it develops into a mature thought. But the other extreme of undue caution may also be fatal, and the mental fort is not captured because a too circuitous line of attack is followed.

One of the greatest enemies of persuasion is suspicion, and until this is removed words are vain, and simply tinkle. Frankness dispels doubt; and, first of all, if one is to be believed he must believe himself. Sincerity carries its own stamp of genuineness. Even in children and dogs there seems to be an instinct that recognizes insincerity by nearly all the five senses, and certainly by sight and sound.

The lawyer in every way possible should try to avoid always seeming to be an advocate, and especially a paid advocate. Too many lawyers give the impression that they are trying too hard to protect a client's interests. If they appear for the defense they give the impression that by every means they will attempt to prevent the guilt of their client from becoming known, and they will not grant that the opposition has even a shadow of a leg to stand upon. As a result, everything they say is discounted, and often might, with equal effect, be spoken in the words of some dead language.

The creation by a trial lawyer of a correct atmosphere surrounding the trial of an issue in court is one of the results of consummate ability, and is brought to pass in great measure by words fitly spoken, that are indeed apples of gold.

The Editor's Comments

A brief discussion of timely topics.

Case and Comment

THE LAWYER'S MAGAZINE

Established 1894.

¶ Edited, printed and published monthly, by The Lawyers Co-operative Publishing Company: President, W. B. Hale; Vice-President, J. B. Bryan; Secretary, B. A. Rich; Treasurer, W. H. Briggs.

¶ Office and plant: Aqueduct Building, Rochester, New York.

¶ TERMS:—Subscription price $1 a year, 10 cents a copy. Advertising rates on application. Forms close 15th of Month preceding date of issue.

¶ EDITORIAL POLICY:—It is the purpose of CASE AND COMMENT to voice the highest legal and ethical conceptions of the times; to act as a vehicle for the dissemination and interchange of the best thought of the members of the legal profession; to be both helpful and entertaining,—serving the attorney both in his work and in his hours of relaxation.

Edited by Asa W. Russell

Vol. 17 SEPTEMBER, 1910 No. 4

A Word from the Editor

A reader of CASE AND COMMENT, who recently sent us an excellent original article, wrote, "I do not know if you desire contributions from sources outside of your staff." We replied: "We are always glad to receive contributions from our readers; the more the better." And that is the message we want to send to all our friends who peruse CASE AND COMMENT. We ask each of you to aid the others by sending us of your best for the benefit of all.

Give us your views in an article of say 2,000 words or less, on topics consonant with our special numbers, elsewhere announced, or on any subject of general interest to the profession that may appeal to you.

Anecdotes of lawyers, interesting incidents arising in legal practice, quaint and curious or humorous legal happenings, are always acceptable.

Write us some of those practical hints and suggestions—born of experience—that were told you by some venerated preceptor, or which you tell to the young men studying under you.

If you approve or disapprove of the teachings of CASE AND COMMENT, send us a pointed paragraph for our "Readers' Comments."

Your kindly interest will help CASE AND COMMENT to justify its sub-title, "The Lawyer's Magazine."

New Court Rules

WHEN the supreme court convenes in September, after the summer vacation, an important new rule of practice adopted by the justices of the appellate division of the supreme court of New York at their convention in Albany last April will be effective. The new rule provides that, on the opening of a case and before any evidence is taken, the attorneys for both the plaintiff and defendant shall state what they expect to prove.

Almost since the beginning of the courts in this state it has been the practice for the attorney for the plaintiff to state what he expects to prove by his witnesses, and then present their testimony before the jury. This has been followed by the statement of the attorney for the defendant, who then proceeds to offer his evidence. It is believed that the immediate presentation of both sides will give the jurymen a clearer conception of what the trial is about. The new rule does not apply to criminal cases.

Another new rule requires that on the sale of real property of an infant, a surety company's bond must be given by

the guardian for twice the amount of the sale, including interest on the sum during the minority of the infant, or the infant may be secured by a mortgage on improved and unencumbered real estate for the same amount as is required for the bond. Personal securities will no longer be accepted. The purpose of this rule is to avoid the losses and scandals which have arisen in the past whereby bonds, perfectly good when they were given, have become valueless.

Photography and Law

"EVER since the days of Daguerre," says the Photo Era, "photography has been regarded as the one infallible means of portraying faithfully any object, scene, or action. Indeed, a photograph is admitted in court as irrefutable evidence; for when everything else fails, a picture made through a photographic lense almost invariably turns the tide. However, such a picture, upon which the fate of an important case may rest, should be subjected to critical examinations; for it is an established fact that a photograph may be made as untruthful as reliable. Combination photographs change entirely the character of the initial negative, and have been made during the past fifty years.

"Everybody is familiar with the changes that can be wrought by the retoucher in a photographic portrait. A practitioner of even ordinary skill can introduce the figure of a patron (made in the studio) into an open air view, well blended and in complete harmony with the surroundings, —without a visible trace of its falsity. It is even possible to represent a person crossing the Mer de Glace or walking in the Avenue des Capucines,—places he has never visited in the flesh. Thus, a person charged with an offense may be able to prove an alibi by the aid of a skilfully prepared combination photograph. By means of a double exposure, and without resorting to manipulation of the negative, a person may be made to appear to be doing all sorts of impossible and ludicrous things, such as playing chess, cards, or fighting a duel with himself, carrying his head under his arm, or holding communion with a departed spirit. In this manner the camera appears to have recorded successfully all kinds of startling phenomena, and with a realism convincing to all except the expert and the initiated.

"Where, then, can photography be considered as irrefutable evidence?

"The photo-speed recorder—the joint invention of two professors of Massachusetts Institute of Technology—is an apparatus which determines with absolute scientific accuracy the rate of speed at which a motor car is moving. Hence, it has been sustained in the highest court of Massachusetts as incontrovertible evidence in cases of violation of the automobile speed law.

"Motion pictures, when taken and projected with scientific precision, and properly authenticated, constitute the most trustworthy and convincing testimony of an occurrence that is possible to conceive. Proof, such as this, is well nigh infallible.

But even what is recognized as straight, genuine photography is not altogether devoid of misrepresentation, involuntary though it may be. This takes the form of distorted features and limbs, also of exaggerated perspective visible in buildings, streets, etc.,—due to the application of a lense of inadequate focal length. Hence, faithful portrayal depends upon the correct employment of the most suitable apparatus and materials,—from the making of the exposure to the completed print, the negative being of supreme importance.

"Danger, therefore, lies in the lack of technical knowledge with regard to the possibilities of imposition by photography. It will not do to rely entirely upon a photograph, whether it be made on paper, glass, metal, or any other base. The shrewd judge and counsel will insist that in every case the negative be submitted, and examined for possible alterations by a clever manipulator. Members of the legal profession should practice photography to familiarize themselves with photographic methods, legitimate and otherwise, the better to appreciate the testimony of experts and practitioners with regard to photographs and their preparation, more particularly to negatives. Therefore it follows that only after a most careful examination has shown the absence of possibility of a photograph

being a false picture ought it to be used as evidence."

Another phase of our subject, photography and law, is presented by the practice of taking snapshots in and about the courts. Sketching has recently been stopped in the English divorce courts, but a London editor complains to the Times that photography is still generally allowed. Witnesses and persons on trial, who may not be guilty, are subjected to the ordeals of cameras leveled at them, and indifferent pictures appear next day in the public prints. Parties engaged in litigation are photographed coming in and going out of the courts. The London Law Journal remarks: "To the judges belongs the power of stopping the objectionable practice. They could, and we hope they will, make an order prohibiting the use of the camera in the courts in which they preside, and any disobedience of such an order, whether the photographer or editor, would be punishable as a contempt of court."

Individuality on the Bench

IF the laws were an exact science, says the Kansas City (Mo.) Star, it would make no difference who were judges of the Supreme Court of the United States, or any other court, so that they were honest men and learned in the law. Their decisions would be worked out with mathematical precision. In fact, if the law were an exact science there would hardly need to be any courts at all, except those for criminal trials.

The law not being an exact science, the Supreme Court of the United States has always held one of the most interesting groups of men in the world. There are individuals in that tribunal's history who stand out as attractively and distinctively as do the most prominent of the statesmen whose service was not on the bench.

It has been remarked that the late Justice Brewer was one of the few Supreme Court justices who took a part in the usual activities of the people,—their politics, economics and every-day interests. This he did. But aside from this, he, in common with all other members of the Supreme Court, did, on the bench, impress his own strong personality upon the affairs of the people. A court of nine men, with Justice Brewer in it, must necessarily be different, not only in personnel, but in effect, from such a court with Justice Brewer out of it. And so of every member of the court. No two sets of nine men would decide the law alike, or hold the affairs of the nation to quite the same complexion. "The king is dead; long live the king!" The kingly office goes on, but who is king marks differences in history. So the court and the law are permanent institutions, but those who administer them mark differences.

Changeless and eternal, one may believe the abstraction called Justice to be. But the pleasing, progressive, infinite variety of human affairs gets into her temple in the individual qualities of her Justices. A court whose annals preserve the differing geniuses of John Marshall, Roger B. Taney, and Salmon P. Chase, to cite no others, is not of the stuff to petrify. It will always be fluid with the life of the nation,—the current of its ideals, its aspirations, its necessities.

The Readers' Comments

A department for the candid and courteous expression of opinion—whether concurring or dissenting.

Weeding Out Poor Lawyers.

Editor CASE AND COMMENT:—

The July issue of CASE AND COMMENT contains an article on page 74, under the caption "Taxing the Lawyers." CASE AND COMMENT quotes the Battle Creek Journal as saying the Honorable James Helme comes "forward with an idea." Says James: "There is a dog law which helps eliminate worthless dogs. Tax the lawyers of the state. We have too many of them, and a tax of $25 or $50 each would help weed out the poor ones." . . .

A just process of weeding out the poor lawyers would never be accomplished by the senseless process of taxing each member of the profession. . . .

Is opportunity invariably the result of talent, ability? If so, I want to ask: Since when? Is a man without superior ability because he is born in poverty-stricken circumstances? Mr. Helme, by the process of his "reasoning," says so. Such a theory is abhorrent to any fair and sane-minded man. What man needs is not more restraint, but more liberty, more opportunity. Some boys undertake the study of the law because their fathers are in affluent circumstances, totally oblivious of their aptitude and natural fitness. Would he be weeded out by a process of taxation? Since when? How? The poor boy, on the other hand, endowed with every natural aptitude and fitness, puts in years of incessant and self-sacrificing toil to become a member of a profession which he at last reached only to be confronted with the necessity of the financial payment, the wherewithal he has not. Would that be just? If so, then the dollar unit is the manhood measurement. What would become of the profession thus imbued? It would naturally and inevitably degenerate, as it must and ought. Where would be the ethics of a time-honored profession? Nonsensical all, completely, entirely, absolutely.

Some states require a stated school period of study, not qualification necessarily and purely so. This is, as it must have been intended to be, a prohibitive bar to the poor but ambitious, and, in all other respects, a worthy boy. This operates as a rank injustice to the poor boy, is damaging to society, and detrimental to the body politic. The state will proceed with its paricidal ingratitude, and ask that same boy, whom it has denied every legitimate and constitutional right, to stand in its defense in its hour of peril. Could anything be more rankling? How much gratitude do I owe those who are only engaged in the curtailment of my absolute liberties? Let those answer who pretend to be the measurers of my happiness. The doctrine of Mr. Helme is simply this: I am in and you are out. You stay out. It is purely the doctrine of exclusiveness. If Mr. Helme feels that the legal profession is overcrowded, then let him exercise his sovereign right of withdrawing. There is absolutely no line of employment without its more than required number of hands and brains, yet I should decline to lay a prohibitive bar to the entrance of any calling. Has not the child born after me as much right to the selection of its own channel of employment as it has to the pursuit of happiness? The one is co-ordinate with the other. Deny or restrict the one, and the other is necessarily extinguished. It certainly is.

It has also been contended on the part of others that it is doubtful whether or not the legislature can impose the qualifications of members preparatory to engaging in the profession of the law, but that it should be left to the court to determine the qualifications of its members. This contention is equally foreign to constitutional logic. The body which makes the law must of necessity have the sovereign right of determining the qualifications of those who wish to engage in the practice of the law. Such cannot in reason be left to the discretion of the court. Why should it? If this is the undisputed right of the court as against the legislature, then I want to say that the court is in the exercise of a counteractive office against the legislature. It certainly is.

I ask CASE AND COMMENT to publish this letter, or reject it, and thus show its colors, demonstrate its principle of fairness and justice.

M. G. LILLIG.

Salida, Colo.

What, Muzzle the Lawyers?

Editor CASE AND COMMENT:—

We read with some degree of interest the idea and expressions of the Hon. James Helme of Adrian, Michigan, relative to the Michigan dog law, which appears to have been enacted to rid the state of the many worthless dogs that infest it. From the effect of this law he thinks a similar one taxing the lawyers in general would rid the state and the profession of the "poor ones." I confess that I do not know whether he means the "poor ones" with regards to wealth or ability, the adjectives "poor" and "worthless" having vastly different meanings, although they appear to be synonymous. But will a license tax of $25 or $50 rid the state of Michigan and the profession of "poor lawyers?" Is that the most effective remedy? I do not think so. What is the cause or source of an influx or overrunning of a state or country with "poor lawyers?" Is it due to the want of a tax of sufficient size on the members of the profession? Where lies the cause? Perhaps if Mr. Helme examine the curriculums of the law schools he may find that they need

some attention, or perhaps if he examine the corps of teachers of the law schools he may find that the dog tag tax is needed there.

There is a remedy somewhere, and it can be found, and if the profession is so crowded in Michigan that Mr. Helme's professional territory is being invaded or the standard of the profession lowered, I suggest that the legislatures of his and other similar states enact a more stringent law for admission to the bar. Then let the examining tribunals discharge their full and sworn duties in connection therewith. In many states the law and rules for admission to the bar are very lax, but as lax as they are, they are far superior to the license tax method. In some states applicants are admitted to the bar upon the recommendation of the dean of the school from which they come, in some they are admitted upon the presentation of a diploma from a presumably recognized school of law; in still some others, they are admitted upon the recommendation of an examining committee of lawyers appointed by the judge of the circuit or superior court when he has not the time to examine the applicants himself. While each of these methods, and perhaps some others, have given to the profession some of the ablest minds of the profession, none is equal to that of having applicants for admission to the bar passed on by the supreme court of the state, which tribunal invariably gives a rigid and thorough test.

Don't muzzle the "worthless" ones or tax the "poor" fellows, because the taxing process will not give the desired relief. In this state the license tax on lawyers—and each member of a law firm must have a license—is $15.25, and this city has an additional tax of $15; these license taxes are payable annually. A year ago the county solicitor brought criminal action against several individuals for doing business without a license. Among those against whom cases were docketed were several lawyers, some standing in the front rank of the members not only of the local bar, but of the state bar; eminent criminal and civil lawyers, some of whom are worth many thousands of dollars, and live in residences that cost several thousands of dollars. The "poor" lawyers, as a rule, are the ones who pay license tax first. Hence, a license tax, a tag or a muzzle, should not be used to accomplish that which the cirriculums, professors, or deans of our law schools should do. The license tax should be used as a necessary revenue for the state, county, and city. When the law schools and their agencies are inefficient or the method of admission is too loose, the legislature should strengthen them, or rid the profession of the "poor" and "worthless" by placing the matter of admission to the bar in the hands of the supreme court, with rigid and stringent rules.

Tampa, Fla.

[CASE AND COMMENT is not in favor of taxing lawyers for the purpose of elimination. Those who are "poor" in spirit or deficient in the elements of success will eliminate themselves. Those who are "poor" in purse have enough to contend against without being burdened with unnecessary taxation. A career at the bar has always been open to every young man, inspired with honorable ambition, and ought to remain so.—ED.]

South Dakota's Streams are Pure.

Editor CASE AND COMMENT:—

In reading your July number CASE AND COMMENT I find upon page 96, under head *"Ita Lex Scripta,"* the proviso attached to sec. 4, chap. 139, Session Laws South Dakota 1909, regarding the incurring of municipal indebtedness "for the purpose of providing *water* and *sewerage* for irrigation, *domestic uses,* sewerage, and other purposes."

Permit me to call your attention to the first proviso of sec. 4, art. 13, Constitution of South Dakota as it now is. You will note that the law of 1909 follows verbatim the language of the Constitution. The proviso was not included in the original Constitution framed and adopted in 1889, under which the state was admitted into the Union. Said art. 13, simply limited the debt of any county, city, town, school district, or other subdivision, to 5 per centum upon the assessed valuation of the property therein, and so remained until 1896, when an amendment to said section was adopted by popular vote, having been submitted by the legislature of 1895, which provided "that any county, municipal corporation, civil township, district, or other subdivision may incur an additional indebtedness not exceeding 10 per centum upon the assessed value of the taxable property therein, for the purpose of providing water for irrigation and domestic uses." The legislature of 1901 submitted to the people the proviso as given in your article, which was adopted in 1902, at the regular election, and under which the law of 1909 was undoubtedly drawn.

The mixing of water and sewerage may possibly be accounted for upon the supposition that the learned legislator who drafted the proviso might have mixed Missouri river water with his ordinary beverage. Otherwise the language is not easily understood. The question arises, if under the Constitution and laws of South Dakota, pure water can be obtained. The writer answers that after a residence of more than twenty-six years in the territory and state, he can affirm that pure water, as pure and cold as found anywhere, abounds in abundance, notwithstanding lawmakers to the contrary, and is used as a beverage by a large majority of our citizens. Great is the wisdom of the lawmakers.

S. V. JONES.

Parker, S. D.

Is the Uniform Entitled to Respect?

Editor CASE AND COMMENT:—

In a recent issue of your piquant little and ever-welcome CASE AND COMMENT, you have an article anent the Hobson Bill pending in

Congress. You say: "The uniform is a symbol of loyalty and of patriotic devotion. It is entitled to respect, next to the flag." How can *you* respect the covering and gilding if you do not respect the man (or it may be, hoodlums), within? What legal power based on right have you to force open the entrance for such into what the bill designates as "Public Places?" First define that term, and see where you'll land. Patriotism, at all times and everywhere, is in uniform.

STEPHEN DE PARRISH.

Richmond, Ky.

[We do not see any valid objection to a measure forbidding the exclusion of men from public places simply because they are wearing the uniform of the Military or Naval service of the United States. The uniform means much to the wearer, and means much to the nation of which its wearers are the sworn defenders. It ought not to be placed under the ban of a general and humiliating discrimination. Why not admit our soldiers and sailors to places of entertainment or amusement on an equality with civilians, subject to expulsion in individual cases, in case of misconduct?—ED.]

Unusual Arbitration Plan

"SO far as I know," writes a member of the Commonwealth Club, according to the New York Sun, "the most unusual method of voluntary arbitration is that instituted by the Chamber of Commerce in London, England.

"The great dock laborers' strike, which occurred in London about 1891, paralyzed for the time being the trade and commerce of that city. The Chamber of Commerce was beseiged by merchants and manufacturers to prevent a repetition of such a calamity, and the matter was referred by the chamber to one of its prominent members, Sir Samuel Boulton.

"His proposal was that the Chamber of Commerce elect from among its members, for the period of one year, a panel of twelve representing the various trades and industries. That the trade unions likewise elect from among their members, for the period of one year, a panel of twelve representing the various trades and industries.

"In the event of a labor dispute being submitted for arbitration, the president of the chamber was to select one or more from each panel, as might be agreed upon by the parties to the dispute. This arbitration board, consisting of an equal number of employers and workers chosen because of their technical knowledge of the matters in dispute, but in nowise directly interested in such dispute, and without the customary selection of an odd member, was to conciliate, investigate, and arbitrate.

"When the plan was first given publicity there were few who looked upon it with favor. The opinion prevailed that, without the odd member on the proposed arbitration boards, no decisions were likely to be reached and that hung juries most likely would follow. It was only human to expect the workers on the board to decide in favor of their fellow workers and the employers on the board to decide in favor of their fellow employers. Sir Samuel Boulton succeeded, however, in securing a reluctant consent to a trial of the plan.

"When I was in London last fall the plan had been in operation for more than seventeen years, and had scored the remarkable record of settling to the satisfaction of both sides every dispute which had been submitted during this long period. Sir Samuel Boulton told me that, however widely the arbitrators may differ in the beginning, without exception in the history of the movement, the decisions during all of these seventeen years had been unanimous, and that without exception both sides had accepted such decisions in good faith."

Among the New Decisions

Comments on recent important or novel decisions made by the courts of the English speaking world.

Disposition of appeal where record is lost or incomplete. Where a convicted defendant perfects his appeal to a court of last resort, and the record in the cause becomes lost or destroyed, without fault on the part of the defendant or his counsel, and said record cannot be substituted, it is held in the recent Oklahoma case of Bailey v. United States, 104 Pac. 917, that a motion to reverse the judgment and award a new trial is properly granted to prevent a miscarriage of justice or a deprivation of the legal right of appeal. This rule is supported by the weight of authority, and no distinction has been made in this regard between civil and criminal cases. The rule presupposes that there is no means available to appellant of restoring the record. Where such means are available, he is, of course, bound to avail himself of them. Some courts, however, as appears by the note which accompanies the Bailey Case, in 25 L.R.A.(N.S.) 860, take the view even when restoration is impossible, that the loss of the record or the portion thereof essential to the consideration of the question raised by the appellant, though not his fault, is his misfortune, and therefore dismiss his appeal, or, in some instances, indulge the presumption that the lost portion of the record would sustain the judgment appealed from, and dispose of the appeal on the merits upon that assumption.

Disbarment for failure to inform court. A question not heretofore passed upon by the courts is presented in the case of People ex rel. Healy v. Case, 241 Ill. 279, 89 N. E. 638, 25 L.R.A.(N.S.) 578, holding that an attorney bringing a suit for divorce upon the identical pleadings upon which, after full hearing, another court of concurrent jurisdiction has dismissed the suit for want of equity, is bound to disclose that fact to the court, under penalty of disbarment or suspension for failure to do so.

One attempting to take car as passenger. The relation of carrier and passenger is one of contract, express or implied, and it may be established by any evidence showing an intent upon the part of a person to become a passenger, and his acceptance as such by the carrier. Depending as it does upon the question as to the sufficiency of the facts to establish the contract, it is not practicable to establish a rigid or arbitrary rule as to what facts will constitute this relation. That one attempting to pass in front of a standing street car to take passage thereon is not a passenger within the rule that carriers must furnish reasonably safe appliances for the accommodation of passengers in getting on and off trains is held in Jaquette v. Capital Traction Co., recently decided by the District of Columbia court of appeals, and accompanied in 25 L.R.A. (N.S.) 407, by a note discussing the recent cases on the effect of signaling a car to make one a passenger, the earlier cases having been discussed in 13 L.R.A. (N.S.) 283.

Uncontradicted statement in presence of accused as confession. The failure of a person to contradict or explain statements or declarations made by third persons in his presence and hearing, charging him with a crime or tending to incriminate him, raises or may raise an implication of admission of the truth of such statements or declarations on his part, and is competent evidence as an indication of guilt of the crime charged, when the circumstances of the case are such as to afford an opportuity to act or speak and such as would naturally call for some action or reply from men similarly situated; but no inference of acquiescence arises from mere silence under accusation, where the circumstances were not such as to call for a statement by him, or from a refusal to answer unauthorized questions, or from statements or actions evincive of innocence, or when the state-

ment or declaration made in his presence is of doubtful import, and not inconsistent with his innocence of the crime charged. In short, the implication of admission arises only where he was silent when the circumstances were such that he ought to have spoken, and a reasonable man similarly situated would naturally have spoken. So, it is held in O'Hearn v. State, 79 Neb. 513, 113 N. W. 130, that statements or confessions made in the presence of one accused of crime who remains silent are admissible in evidence if the time, the place, and the circumstances are such as to lead to the inference that the accused, by his silence, assented to the truth of the same. And in the recent North Carolina case of State v. Record, 65 S. E. 1010, it is held that upon trial of one for larceny, uncontradicted declarations of his wife, made in his presence, to the effect that stolen property found in the house belonged to him, are admissions against him. These cases are accompanied in 25 L.R.A.(N.S.) 542, by a subject note, which exhaustively presents the case law upon this interesting question.

Regulation of speed of interstate trains. How frequently and how much can a railroad company be compelled, by a state statute, to check the speed of its trains without interfering with interstate commerce? This question has arisen in the state of Georgia and has found its way finally to the Supreme Court of the United States. That court recently decided in Southern R. Co. v. King, U. S. Adv. Sheets, p. 594, that a state may regulate, at least, in the absence of congressional action upon the same subject-matter, the manner in which interstate trains shall approach dangerous crossings, the signals which shall be given, and the control of the train which shall be required under such circumstances. The court further determined that general averments in an amended answer in an action to recover damages from a railway company for a wrongful death caused by violation of Ga. Civ. Code, § 2222, requiring the slackening of speed at highway crossings, that such statute violates the commerce clause, and is a direct burden upon and impedes traffic, and impairs the usefulness of the railway company's facilities for that purpose, and that it is impossible to observe the statute in carrying mails and in interstate commerce business, are not sufficient as against demurrer, since they are mere conclusions, and do not show the number or location of the crossings at which the railway company will be required to check the speed of its trains, nor that the particular crossing is not a dangerous one.

The husband of Josephine King was killed by a train on the Southern Railway while he was attempting to drive over the track in a buggy at a highway crossing to which this statute applies. The widow brought suit against the railroad corporation to recover damages for having thus wrongfully caused her husband's death, and she alleged in her complaint that the negligence of the defendant was its violation of the state law, which required it to check and keep checking the speed of the train while approaching the crossing at which her husband was killed.

The defense of the railroad company was that the state law imposed an unconstitutional burden on interstate commerce. The answer alleged that it was impossible to observe the Georgia statute and at the same time carry the mails as the Southern Railway Company was required to carry them under the contract it had with the government; furthermore, that it was impossible to do interstate business and at the same time comply with the terms of the state law. This defense was overruled in the United States circuit court in the northern district of Georgia, where the case was tried, and the widow recovered a judgment against the railroad company. That judgment was affirmed by the United States circuit court of appeals. The case was then taken to the Supreme Court of the United States.

A majority of the judges of the Supreme Court, as we have stated, thought that the defense was not pleaded in such a way as to be available to the railway company. The prevailing opinion was written by Mr. Justice Day, who declared that an inspection of the answer showed that it did not contain a proper averment

of the facts to the effect that the operation of the statute in controversy was such as unlawfully to regulate interstate commerce. According to the view of the majority, this averment was a mere conclusion, setting forth no facts which would make the operation of the statute unconstitutional. Mr. Justice Oliver Wendell Holmes and Mr. Justice White dissented, holding that the averments that it was impossible to obey the statute and at the same time transport the government mails, and that it was impossible to do an interstate business and also observe the requirements of the state law, were pure allegations of fact, which referred to physical conditions and constituted an adequate statement of the railway company's defense. The dissenting judges deplored the action of their associates in treating a merely technical objection to the pleadings as fatal to the defense. "It seems to me a miscarriage of justice," said Justice Holmes, "to sustain liability under a statute which possibly, and I think probably, is unconstitutional, until the facts have been heard which the petitioner alleged and offered to prove."

After this distinct intimation from two members of the Supreme Court of the United States that the Georgia statute is unconstitutional, it is tolerably certain that the question will be raised again in such a form as to obtain a positive adjudication as to its validity one way or the other.

Validity of sale of expectancy by prospective heir. The rule of the common law was that the sale or assignment of a mere expectancy by the prospective heir was void, although, when based upon a sufficient consideration, such transactions were sustained in equity. The recent Kentucky case of Spears v. Spaw, 118 S. W. 275, in conformity with this rule, holds that an attempted conveyance by heirs apparent of their interest in the property of the ancestor, even with the latter's consent, is void. In some cases, however, such assignments have been upheld at law, under the doctrine of estoppel, as appears by the note accompanying the Spears Case, in 25 L.R.A. (N.S.) 436, and which is supplemental to earlier notes in 32 L.R.A. 595, and 33 L.R.A. 266.

It has also been held in the recent Tennessee case of Taylor v. Swafford, 123 S. W. 356, 25 L.R.A.(N.S.) 442, that a *feme covert* cannot convey her expectant interest as heir of her father.

Liability for malicious erection of fence. It is generally held that the malicious erection of a "spite fence" will not give the injured party a remedy either at law or in equity. However, the contrary has been decided in one or two states, and the recent case of Barger v. Barringer, 151 N. C. 433, 66 S. E. 439, holds that to maliciously construct a fence on one's property to cut off the light and air from his neighbor's windows is actionable, and is accompanied in 25 L.R.A.(N.S.) 831, by a note which discusses the earlier cases pertaining to the question.

Labeling retail packages of food. The recent Michigan case of Armour & Co. v. Bird, 123 N. W. 580, 25 L.R.A.(N.S.) 616, is apparently the first to squarely present the question whether the requirement of pure-food laws as to labeling applies to small retail packages taken from the original package of the manufacturer. It is there held that packages of sausages composed of meat and cereals, sold to consumers from a large package, must be labeled so as to show the fact of the combination, under a statute requiring mixtures and compounds recognized as ordinary articles of food, to be labeled in a manner plainly and correctly to show that it is a mixture or compound

Right of beneficiary to pay assessments. The recent case of Proctor v. United Order of the Golden Star, 203 Mass. 587, 89 N. E. 1042, 25 L.R.A.(N.S.) 370, holding that the beneficiary in a mutual benefit certificate has no right to reinstate the member against his will by paying assessments which he has passed, seems to be one of first impression.

Duration of contract of hiring. The review in a case note in 25 L.R.A. (N.S.) 529, of the numerous decisions upon the duration of a contract of hiring which specifies no term, but fixes compensation at a certain amount per day, week, month, or year, shows the existence of considerable conflict, and leaves some doubt as to whether the opinion that such a hiring is for the full period, or the contrary view, that it is indefinite and terminable at the will of either party, is better supported by the authorities. The note is appended to the case of Warden v. Hinds, 90 C. C. A. 449, 163 Fed. 201, holding that a contract for personal services at a certain sum per week, with no mention as to its duration, may be terminated by either party at any time, without notice.

Liability of master for injury to minor servant misrepresenting age. This somewhat unusual question is presented in the recent Kansas case of Lupher v. Atchison, T. & S. F. R. Co. 106 Pac. 284, holding that the fact that a brakeman obtained his position by falsely stating that he was of full age when he was in fact but eighteen years old—a rule of the company forbidding the employment of minors in that capacity—does not relieve the company from its obligation to exercise the same care for his protection that is due to any other employee, or disentitle him to recover for an injury due to the want of such care, and not occasioned by his minority or immaturity. A discussion of the few cases heretofore treating the subject may be found appended to the report of the Lupher Case in 25 L.R.A.(N.S.) 707.

Assumption of risk. An engineer who discovers while *en route*, that the locomotive is defective, is held in Koreis v. Minneapolis & St. L. R. Co. 108 Minn. 449, 122 N. W. 668, 25 L.R.A.(N.S.) 339, not to assume the risk of injury from such defect, as a matter of law, by continuing his run. It is considered that a railroad engineer owes a duty to the public as well as to his employers, and is justified in taking much greater risks than employees in other occupations, without necessarily forfeiting the right of action for injuries resulting from his master's negligence, of which he has knowledge.

It is a general rule that a servant who injures himself by overstraining his muscles in overexerting himself in lifting weights, etc., cannot hold his master liable, as he himself must be the judge of his own strength; and this is so although the work is attempted at the immediate direction of the master. Even in such cases the servant is deemed to have assumed the risk. This rule was applied in Stenvog v. Minnesota Transfer R. Co. 108 Minn. 199, 121 N. W. 903, holding that a servant directed to assist in loading heavy rails onto a car, and who is told to go on, after complaining that the work is too heavy for him, is not entitled to recover, where he sprained his back as he was lifting one of the heavy rails, since he was the best judge of his own lifting capacity, and the risk is upon him not to overtax himself. The earlier cases dealing with this subject are collated in a note which accompanies the Stenvog Case, in 25 L.R.A.(N.S.) 362.

It is also a rule generally followed that where a servant is engaged in a work which necessarily results in causing chips of iron or other material to fly off, or which creates dust which is liable to fly around, he, if a man of ordinary intelligence and mature years, assumes the risk of danger from such chips or dust, and the master owes him no duty to warn him of what is necessarily an obvious danger. This principle is illustrated by the recent Washington case of Nordstrom v. Spokane & I. E. R. Co. 104 Pac. 809, holding that a lineman on an electric railway assumes the risk of injury from iron dust falling into his eyes from lugs on poles which he is required to cut with a hack saw. This decision is accompanied in 25 L.R.A.(N.S.) 364, by a note which sets forth the case law pertaining to the subject.

Exceptions to rule as to safe place. The general rule that a master must exercise reasonable care to furnish a safe place for his servant is not of universal application, but is modified by a number of well-defined ex-

ceptions. One of these exceptions is where the employment of the servant is for the very purpose of making the place safe, and is illustrated by the case of Neagle v. Syracuse B. & N. Y. R. Co. 185 N. Y. 270, 77 N. E. 1064, 25 L.R.A. (N.S.) 321, holding that a rule requiring a master to furnish a safe working place for his employee does not apply in favor of a fireman on a locomotive engaged in propelling a plow to remove snow from the track, so as to render the master liable for an injury caused by the overturning of the locomotive because of solid ice which other servants knew to be under the snow. And a similar case is that of Graham v. Detroit G. H. & M. R. Co. 151 Mich. 629, 115 N. W. 993, 25 L.R.A.(N.S.) 326, in which it is laid down that a railroad company performs its duty to employees sent to repair a washout, if it makes proper effort to acquaint them with known conditions of unsafety, although the information does not, in fact, reach them because of the negligence of the servant to whose care the message was intrusted, which due care on the part of the master would not have prevented or discovered.

Another exception to this general rule arises where the servant is employed to repair a dangerous or defective appliance. This exception is based upon the ground that it would be unreasonable, if not impossible, to require the master to furnish a safe appliance for the servant to work upon, when the very purpose of the employment is to make the dangerous appliance safe. The same general principles apparently apply to making a dangerous appliance safe as apply to making a dangerous place safe. This class of cases is illustrated by Reed v. Moore, 82 C. C. A. 434, 153 Fed. 358, 25 L.R.A.(N.S.) 331, holding that an employee who undertakes to repair an elevator known to be out of repair and unsafe assumes the risk of injury from such unsafe condition.

Nor is the rule which requires the master to furnish reasonably safe and suitable machinery, tools, appliances, and premises to the employee applicable to cars and engines being moved to the repair shops for the purpose of rendering them safe and suitable. This doctrine is applied in Southern R. Co. v. Lyons, 95 C. C. A. 55, 169 Fed. 557, 25 L.R.A. (N.S.) 335, holding that an experienced railroad employee placed in charge of a wrecked engine which is being removed to the shops for repairs, and from which the cab and hand holds which were attached thereto are removed, is charged with notice of such removal, and assumes the risk of danger incident to such mission.

The cases in which the foregoing exceptions to the general rule is discussed are collected in notes which accompany the L.R.A. report of the cases.

Materiality of false testimony as element of subornation of perjury.

It has been repeatedly held that the testimony upon the procurement of which a charge of subornation of perjury is based must be material to the issue. The recent case of People v. Teal, 196 N. Y. 372, 89 N. E. 1086, 25 L.R.A.(N.S.) 120, is in line with the earlier cases, and holds that one cannot be convicted of attempted subornation of perjury for attempting to secure false testimony which is so immaterial to the issue that the witness should not have been convicted of perjury had he given the testimony in the action. There is, however, a dissenting opinion concurred in by three judges, who do not deny that, so far as subornation of perjury is concerned, the materiality of the testimony is essential; but the minority dissent from the view taken in the prevailing opinion, that the testimony in question was immaterial.

Employer's liability for murder of paymaster by assailants.

An unusual case recently arose under the workingmen's compensation act in England. On March 18 last, says the New York Sun, Mr. John Innes Nisbet was murdered in a train on the Northwestern railroad between Newcastle and Alnmouth. He was in the service of the Stobswood colliery, and at the time of his death was carrying money to the colliery to pay the miners their wages. His possession of this money was the inducement which led his

assailants to kill him. Mrs. Nisbet, the widow, sued the owners of the colliery for compensation for her husband's death, under the statute, and the judge of the county court at Newcastle-on-Tyne awarded her damages in the sum of £300.

It should be observed that here was no element of wrongdoing or negligence on the part of the employers. They had not done anything which they ought not to have done, or left undone anything which they ought to have done. The fatal misfortune of their paymaster was due simply and solely to the position which he occupied. It was as though a sentry should be killed while on guard, to plunder the post he was guarding. The court of appeal in England has just affirmed the judgment.

The workingmen's act contemplates compensation by the employer to the employee, or in case of death to those dependent upon him, where "in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman." The qualifying words "by accident" are quite important. The court of appeal holds that a murder is an accident, within the meaning of the statute. This is in accordance with previous decisions as to the sense in which the word is used in this particular enactment. Thus Lord Justice Lindley has said: "Accident is not a technical legal term with a clearly defined meaning. Speaking generally with reference to legal liabilities, an accident means an unexpected and unintended occurrence which produces hurt or loss."

And Lord Macnaghten has declared that the expression is employed "as denoting an unlooked for mishap or an untoward event which is not expected or designed." This means not expected or designed by the victim. Of course the person who murdered Mr. John Innes Nisbet, the colliery paymaster in this Newcastle case, intended to kill him, but the homicide was none the less an accident to the murdered man, in the view of the law which has been taken by the court of appeal.

Title of one taking money from thief or embezzler.

It may be safely said that the great weight of authority supports the general proposition that only bad faith on the part of a third person receiving stolen money, or failure on his part to pay a valuable consideration therefor, will defeat his title thereto as against the true owner. It is so held in First Nat. Bank v. Gilbert, 123 La. 846, 49 So. 593, which is accompanied in 25 L.R.A. (N.S.) 631, by a case note discussing the considerable number of authorities dealing with the question.

Title of owner of chattel as against vendee or creditor of possessor.

Does the owner of a chattel run the risk of losing it by parting with possession? Has the mere holder of such property such ostensible ownership that third persons may deal safely with him on the strength of the apparent title? These questions, in effect, are answered in the affirmative in Davis v. First Nat. Bank, 6 Ind. Terr. 124, 89 S. W. 1015, 25 L.R.A.(N.S.) 760, holding that one who, pending a negotiation for a lease, places personal property which is to be the consideration for it in the possession of the other party, and permits him to use it as his own for a year, is estopped to assert title against one who, without notice, has taken a mortgage upon the property as that of the one in possession. No shadow of support is to be found in other jurisdictions for the rule adopted by the Indian territory court, as appears by the exhaustive subject note which accompanies the L.R.A. report of the case.

New or Proposed Legislation

A glance at the labors of our lawmakers.

Federal Aid in Mine Disasters.—It must be apparent to the most careless reader that mine disasters, instead of occurring less often, are becoming more numerous.

The fact is forced on thinking people that those who are directly or indirectly responsible for the lives of the men who work below the surface of the earth are doing nothing that is effectual in lessening the dangers of mining coal. The only advance which has been noted of late is a new outfit for exploring mines after a disaster has occurred. This is the oxygen helmet.

In view of this fact, Senator Dick's bill to increase the number of mine-rescue stations seems to be meritorious. There are four of these stations now established, situated at Pittsburg, Knoxville, Tennessee, Urbana, Illinois, and Seattle. Their establishment was one feature of the experimental work undertaken at small expense by the Geological Survey. At these stations the oxygen helmet and other life-saving devices were tested, and miners of the vicinity instructed in their use. The volunteers thus trained constituted an emergency force available for service even at considerable distances from the stations. There are too few stations, however, and, according to a report from the Secretary of the Interior, the loss of life in the Cherry disaster would have been much less had there been a properly equipped emergency camp closer to the scene. The Dick bill would increase the number of stations from four to twelve, at an additional cost of about $150,000 a year.

This surely is a modest sum, says the Philadelphia Record, to pay for humanity's sake, and the possibility that thereby several hundred lives could be saved annually should justify the outlay even to the most hard-fisted utilitarian. The objection that the establishment of these rescue stations and emergency camps would be an invasion of Federal authority into the domain of the states is trivial. Mine regulation, to be sure, is part of the police power of the states; and possibly a mine operator could not be compelled to accept the aid of a disciplined Federal rescue corps if disaster should befall in his diggings. A refusal in such a case, however, would be unthinkable. A person whose house is on fire will not drive away a fire company because it belongs to another village or because it is a volunteer organization. Stricken San Francisco did not reject the aid of the Red Cross society because it was organized under a Federal charter. Shipwrecked mariners of any nationality are afforded and accept help from the life-saving corps of their own or any foreign coast. German miners not long ago crossed the border to help rescue Frenchmen entombed as the result of a frightful colliery explosion, and were received with enthusiasm.

Humanity acknowledges no frontiers. Least of all should the division between state and Federal authority be a barrier to good works.

Creating Judges Who Are Specialists.—Students of political economy, says the Grand Rapids Herald, will find rare food for thought in the development during the past few months of special judicial tribunals to deal with special technical branches of jurisprudence. President Taft, himself a lawyer and jurist of high standing and constructive thought, has led in this movement. It may be prophetic of an ultimate radical change in our court procedure generally. If the experiments now under trial prove the virtue of the principle underlying their creation, American legal thought, and particularly the President himself, may have credit for leading the world in the formation of a more practical mode of court procedure, a more practical, economical, and equitable dispensation of justice.

We refer to the creation by the present Congress of a customs court and a commerce court. Here are two permanent benches which will deal with legal problems of a distinctly technical charac-

ter,—problems which heretofore have had to depend for adjudication upon jurists presiding over general sessions.

Now we are to have a special court, authorized to sit where occasion requires, which will pass upon all legal issues emanating from our tariff laws; and who will deny that a court which specializes in customs cases will not acquire an intimate technical familiarity with tariff problems which will permit of more equitable decisions,—decisions which go to the root of the right, decisions which can come with a sure speed and facility utterly impossible when rendered by judges whose information and training along these lines is only incidental.

We are to have a special court whose entire attention will concentrate on commercial issues growing out of our constantly multiplying commerce laws. These judges will become experts in their familiarity with law and precedent and proper interpretation of these statutes. The greatest justice which is humanly possible will characterize their decisions, because knowledge is power. Necessity of endless argument will disappear, because the court will know more law than the pleader. There will obviously be a despatch in the transaction of business which will defy expensive and exasperating delay. All these advantages, in a word, spell a more practical justice.

This is an age of specialization; in other words, an age of mastery. The "jack of all trades" wants for a job. The specialist is ever in demand. Why is not the President absolutely logical when he carries the application of this theory to the courts?

The court which heard a murder trial last week, a divorce case this week, and which will pass on a corporate accounting next week, will make honest and conscientious effort to do justice to all; and justice probably usually results. But no court can cope with specializing lawyers who appear in these divergent issues, and be as completely the master of the situation as though the judge himself were the greatest specialist of them all.

And so we shall watch this customs court and this commerce court with interest. In our judgment they mark a decided epoch in our development. We prophesy a patent court and a postal court in the near future. If these be successful, there is no telling to what ends the revolution in legal procedure may go.

Abolition of the Original Jurisdiction of the Circuit Courts.—The chief feature of the bill introduced by Representative R. O. Moon, of Pennsylvania, as appears by the report submitted by him from the committee of the revision of laws, and that in which it most materially differs from existing law is found in the fact that it confers all the original jurisdiction cognizable in courts of first instance, on the district court of the United States, thereby eliminating entirely the original jurisdiction of the circuit court, the effect of which is to confine the duties of the circuit court judges chiefly to their appellate work in the circuit court of appeals.

One of the first acts of the first Congress, in 1789, was the completion of a judicial system by adding to the appellate court created by the Constitution courts of original jurisdiction in which all cases that might arise under the Constitution of the United States, the acts of Congress, and the treaties made pursuant thereto, should be cognizable. The plan devised and adopted was to create the district as the unit of this judicial system, and to proceed to divide the territory of the country into districts and appoint in each district a judge who should be known as the district judge, and to confer upon the district court so created original jurisdiction. This plan then further provided that the districts previously created should be divided into three circuits, to be called the eastern, middle, and southern circuits, and established therein a court to be called a circuit court, which should consist of any two judges of the Supreme Court and the district judge of such district, to which said circuit court original jurisdiction was given, exclusive in certain classes of cases, and in certain classes of cases concurrent with the district court; and, in addition to its original jurisdiction, an appellate jurisdiction was given over all final judgments or decrees of the district court where the matter in controversy exceeded in amount $50.

The Supreme Court of the United

States upon its organization was a court without a docket and without a record. Its original jurisdiction was extremely limited, and of appellate cases it had none; and in the first ten years of its existence it had before it for argument and decision on appeals only ten cases; and the chief work of its justices was therefore done in the circuit courts, in the exercise of the original jurisdiction conferred upon these courts.

The growth of business in the Supreme Court of the United States is one of the phenomena of judicial history. From a court without a single case in 1789, when its judges were almost wholly occupied in the trial of cases upon the circuits, it expanded until, in 1891, the pressure of business upon this court became so great that a suitor at its bar was compelled to wait for a period of five years to have his case reached; and the situation became so intolerable that on March 3d in that year a bill was passed by Congress creating a new court, to be known as the circuit court of appeals, to which final appellate jurisdiction was given in a large class of cases in order to relieve the Supreme Court of its superhuman labors, and to afford the litigants of the country an opportunity for the final adjudication of their rights. By this act nine new courts were created, one in each judicial circuit of the country. These courts, as their title indicated, were wholly appellate courts. Their jurisdiction was established by taking away all of the appellate jurisdiction vested in the circuit courts by the judiciary act of 1789, and by adding thereto a large part of the appellate jurisdiction previously vested in the Supreme Court. This legislature therefore changed absolutely the whole jurisdictional scheme of the circuit court, and devolved upon its judges the large, important, and rapidly increasing work of a new tribunal. Prior to this time the rapid growth of the appellate work of both the Supreme Court of the United States and the circuit courts had compelled Congress to relieve them in a large measure of their original jurisdiction. The duty of the Supreme Court justices to sit in the circuit courts was reduced to the necessity of a formal visit once in two years, and the act of 1869 had relieved the circuit court judges largely from the necessity of sitting as trial judges by providing that a circuit court might be held by a district judge of the district sitting alone.

Since 1891, under the provisions of this act, the district court judges of the United States, in addition to the regular work in their districts, have exercised the power of circuit court judges in the trial and disposition of almost the entire circuit court docket throughout the country. The circuit courts of the United States, therefore, as they exist to-day, both in jurisdiction and in the personnel of the judges, are wholly different from the courts created by the judiciary act of 1789. They have no appellate jurisdiction. They are presided over not by a Supreme Court justice, but by a district judge. The labor of the circuit court judges is confined almost exclusively to work in the circuit court of appeals, and the rapid expansion of the work of that court will of necessity, in the course of a few years, eliminate him entirely as a factor in the performance of his duties as a judge of the circuit court. Yet, because under the existing laws certain exclusive original jurisdiction is given to the circuit courts, there is necessarily maintained in every district of the United States and in every division thereof, now seventy-eight in number, the complete machinery of a circuit court, consisting of court rooms, clerks, dockets, marshals, and all of the extensive and expensive features of a court organization. The commingled jurisdiction between it and the district courts is perplexing, and oftentimes confusing to litigants and attorneys. Its exclusive jurisdiction is not based upon any organic principle of distinction, and there exists no longer any reason, either in theory or practice, why the original jurisdiction of the court should be maintained.

Bar Associations

What the Bar Associations are doing and saying.

September Bar Association Meetings

The Tennessee Bar Association meets at Chattanooga on August 29th, 30th, 31st, and September 1st and 2d. The meeting will be held in conjunction with the American Bar Association, which convenes at the same time and place.

The Bar Association of New Mexico will meet at Los Vegas during the month of September, on a date which has not been determined at this writing.

Alabama Bar Association

The Alabama Bar Association, in the closing session of its thirty-third annual convention, elected John London, of Birmingham, as its new president. Hon. Emmet O'Neal, Democratic nominee for governor of Alabama, is the retiring president. Lawrence Cooper, of Huntsville; W. P. Acker, of Anniston; Thomas M. Stevens, of Mobile; B. B. Bridges and C. B. Verner, of Tuscaloosa, were named vice presidents, and Alexander Troy, of Montgomery, was re-elected secretary and treasurer.

By a unanimous vote a committee was appointed to draft a measure providing for the establishment of an intermediate court of appeals to relieve the supreme court of certain duties, this body to report at a special meeting of the Bar Association, to be called prior to the next session of the legislature.

Old Common Law as Trust Remedy

Frederick J. Stimson, of Boston, spoke before the Bar Association of Indiana on "The Law of Combined Action or Possession."

The point of his address was that the law of combination, combined action of ownership, is, and is going to be, the most important branch of common law for the next generation, and it is also the very oldest English common law that we have. He said in substance:

"The same questions came up in early England in the thirteenth, fourteenth, and fifteenth centuries precisely that we are having to-day in this country. It is the English common law which grew from the customs of the people, and not from statute, and developed a theory of what law should be applied to combinations of persons which is peculiar to English common law, and has been the admiration of continental jurists ever since they became acquainted with it; notably with Napoleon, who boldly took it over into his Code Civile.

"And the great beauty and profundity of that law was that it recognized the great power of combination either of individuals or of capital, and it applied a higher standard of moral duty to combined action than it was possible for the law to apply to the action of an individual which must lie within his own conscience. It was recognized in very early England that a combination to ruin a man, although no criminal act is done, is a highly criminal offense. Take, for instance, that I may refuse to trade with a baker in my town. I have a right not to trade with him, but if I call a meeting of all the individuals in that town and get them to combine and agree not to trade with that baker, we are going to ruin that baker absolutely.

"Therefore, this old law of conspiracy recognized that not only was combined action or possession for a criminal purpose unlawful, but it was equally unlawful when it had a purpose merely immoral, such as the injury of a third party or of the people in general, as in the case of our trusts and combines in restraint of trade. That law was established in its perfection five hundred years ago in England, and all our anti-trust acts have really added nothing to it.

"But the law had been forgotten, and the only real reason for passing our anti-trust statutes was to remind people again of this common law; and in the case of the Sherman act it was necessary in order to apply these common-law principles to matters of interstate commerce, there being, in the absence of statute, no Federal common law.

"I should urge that this law be studied,—not forgotten, not repealed, but rather strengthened. It is the one great domain of our common law, outside of criminal law, which goes into the question of intention, of moral purpose; that is to say, I may combine in order to increase my own business, but not for the immediate purpose of injuring my neighbor or the people at large. I hold, therefore, that this great question of conspiracy,—the law of combination,—whether of properties or of persons, is to be determined by the first intent of the combination.

"In my opinion, no jury will ever have any difficulty in determining that intent. That is precisely what juries are for; for as they have to do it in all cases of criminal law, so they can do it in this. The very trouble with the Sherman act—what I suspect is perplexing our Supreme Court to-day—is that they are asked to determine questions of fact, for instance the primal intention of the Standard Oil combination, without the assistance of a jury. It is not the effect, the result, nor is it a criminal or unlawful act actually committed that has any bearing, except merely as evidence; and this had been repeatedly decided by our Supreme Court and others. The combination may be a much higher crime, a much more dangerous thing than even a criminal act committed under it.

"In short, our ancestors had the intelligence to learn in life the dangerous power of association, and have recognized it in this law. It is a common complaint of the laymen that the law does not recognize the higher justice, the higher domain of morality, one's duty to one's neighbor. Now this is not the great evil of our common law, which does do that. It seeks to apply the Golden Rule, which looks into your motive, both as respects your neighbor and the state or the people at large.

"It is applied with equal impartiality to boycotts, combinations of individuals, and to blacklists, trusts, or combinations in restraint of trade to put up prices or to carry on unfair competition, which are combinations of capital.

"Of late, certain statutes have been proposed by, as it seems to me, more or less superficial reformers, who wish to do away with all this English-American law of combination. One great body of our common law, I repeat, is based on the Golden Rule, and I am here to urge that it be not given up.

"The whole point is that this law was forgotten for centuries, and suddenly the old emergency sprang up again,—the same combinations of individuals as in the old trade guilds in England, and of capital as in the old cases of monopoly.

"It seems to me they took our bench and bar by surprise, those things which had not been remembered or studied for centuries. The law of England seemed to have been so fully established that it was forgotten, and, in their haste to meet the evil, our legislatures, state and national, passed a crude legislation, which so far as it embodied the common law was good and has lasted, but when it went beyond the common law was apt to be absurd or unconstitutional. It is the duty of the bench and bar to reinform themselves on this most important matter, and not think that it is a hopeless evil, which has been both met and surmounted in the past history of our great civilization."

Employers' Liability Law

Edgar A. Bancroft, president of the Illinois State Bar Association, in speaking on the subject of employers' liability, declared that the chief importance of such legislation did not lie in the legal questions involved, nor in a sure recompense for injured workmen. "It lies," he said, "in the fact that if a plan is found for insuring every workman against loss through accidents in his employment, it will not only end the personal-injury disputes between employer and employee, and relieve the courts of a very large burden, but it will also preserve the independence of the men and their families, and at the same time remove entirely the wasteful anti-social influence of such strife, and unite, as they should be united, the employer and the employees in a common interest and purpose."

President John T. Dye, in his address before the Indiana State Bar Association, called special attention to the em-

ployers' liability act. "The law which has been adopted on the continent of Europe and in England," he said, "provides a plan by which employees in dangerous employments, and in some cases in all employments, shall be paid a sum fixed in a schedule for personal injuries received by them in the course of their employment, with or without the negligence of the employer, when the injury is not the result of their wilful act or gross negligence. In some cases the law is made compulsory; in others optional.

"Lawyers will agree that such a plan, when compulsory, would be in violation of the Constitution of Indiana. It takes the property of the employer when he is not in fault and gives it to the employee, without due process of law. It deprives both employer and employee of the right to trial by jury in cases where such right existed at the time the Constitution of Indana was adopted. It deprives both employer and employee of their freedom of contract. But if it should be deemed wise to recommend the optional law, leaving open to the employee his right of action in cases of negligence, a plan for insurance by corporation, under control and direction of the state and limited to the insurance of injuries to employees, might be devised which might be inviting to both parties. . . . Such a company should be managed by insurance commissioners appointed by the state, so as to insure the fair and impartial administration of the business, and gain and hold the confidence of the employees. This would open to both employer and employee the freedom of contract, which is a shield and defense, and both could have the right of trial by jury and due process of law.

"An employer of workmen can now buy accident insurance for a premium. Being thus indemnified from all damages naturally lessens his anxiety and care to prevent accidents, for where there is no loss there will be no great care. And reliable statistics show that only about 36 per cent of the sums paid for accident insurance reach the injured. There are no reliable data showing what proportion of the injured are compensated where the employer does not hold accident insurance."

Cost of Impairment of Usefulness of Individual

Probably no action involving more far-reaching consequences was ever taken by the Pennsylvania Bar Association than that evidenced by the resolution, indorsed by the leading judges and lawyers of the state, and which was adopted at the recent session, calling upon the next legislature to authorize the appointment of a commission to inquire into the laws governing the liability of employers for industrial accidents.

"Appalling in its injustice" is the fit phrase applied by those conservative men of the law to our present system of dealing with industrial accidents and resulting claims for damages by crippled employees. "Simple human justice" is what they declare an equitable employers' liability law.

The admirable committee report, calling for a fair and businesslike compulsory employers' liability law, by means of which one European country alone estimates that it saves annually $250,000 in the efficiency of the German workmen and the increased product and profits of the German employers, contains this comment: "Out of the enormous number of industrial accidents in Pennsylvania happening every year, only a small number entitle the employee to a recovery under the present law. The proportion is not more than 25 per cent. Some authorities would place it as low as 10 per cent. The remainder are due to "the ordinary risk of the business," and the burden of them is borne by the employees themselves. The financial burden, which ought to fall upon the industry, is placed upon the employees. They cannot bear it, and the result is untold suffering, and, in many cases, pauperism."

The recognition of the sound principle that the cost of impairment of the usefulness and productivity of the individual should be counted a fixed charge upon the person or corporation that, in the course of profit making, caused that individual to become impotent as a worker and more or less a charge upon the public, carries a meaning deeper than appears upon the surface.

From Judge Endlich, in that same meeting of the Pennsylvania bar, came

these impressive words. "Our commonwealth should be in a position to rid itself of the reproach that, while annually taking enormous sums from the licensing of the liquor traffic, it has thus far been unable to supply the means and suitable institutions for the care of the victims of that traffic before they have reached the stage of positive dementia.

"Whatever may be our several views concerning the legitimacy and necessity of the business, we must all agree that to many of our brethren in every walk of life their weakness makes the opportunities held out to them irresistible allurements to self-destruction, and that, in so far as these unfortunates can be restored to health and usefulness or kept out of further harm's way, the state is bound in ethics and humanity to apply to that purpose, ahead of every other, the revenue derived by it from that source."

Aside from all differences of opinion concerning license, local option, or prohibition, says the Philadelphia North American, this is the plain truth of business justice. Students of civics and medicine alike have concluded that penal treatment of the inebriate is irrational and costly folly. Drunkenness is a disease. And it must be recognized and combatted as is tuberculosis, as a curable physical weakness that, left uncured, entails enormous harm not only upon the individual, but upon the community, the nation, and the race.

The right of the doctrine of the employers' liability is universally conceded. The logic is unescapable that the maker of cripples and incompetents should be required to pay for the care or the cure of those maimed for his pecuniary profit.

No more than the mill-owner or the mine-owner should the brewer, the distiller, or the wholesale or retail liquor dealer be permitted to cast upon the community the men he—with or without intent, matters not—made useless in the process of his enrichment.

Admiralty Law Reform

George Whitelocke, of Baltimore, opened a joint session of the Maryland and Virginia Bar Association with a paper on recently proposed reforms in admiralty law. He attacked the weakness of the common law of admiralty in regard to recovery for death caused by the negligence of ships at sea. There is no such recovery at law now. He urged that Congress should enact a statute covering such causes and remedying the present defects caused by the nonuniformity of the statutes of the states.

International Arbitral Courts

Former Governor A. J. Montague, of Virginia, delivered an address before the Maryland and Virginia Bar Associations on "The Development of Remedial International Law," in which he urged the creation of an international court of justice, analogous to the Supreme Court of the United States. He suggested that the blowing up of the Maine might have been adjudicated by such a court. Continuing, he voiced a strong plea for all international arbitral courts.

Advocates the Income Tax

At the annual meeting of the Missouri State Bar Association, Dean Henry Wade Rogers, of the Yale Law School, delivered an address on the proposed income-tax amendment of the Constitution of the Unted States. He advocated the ratification of the amendment.

The decision of the Supreme Court of the United States in the case of Pollock v. Farmers' Loan & Trust Company made it essential, he said, to amend the Constitution in order that the national government be able to command the national resources of the country in times of crisis.

Mr. Rogers took the same view that Senator Root entertains of the words, "from whatever source derived," as used in the text of the amendment now before the states, and stated that it was his conviction that the Supreme Court would construe these words as authorizing Congress to tax the instrumentalities of the states. He thought the states could not make a success of taxing incomes.

Law Schools

A department dedicated to the judges and lawyers of the future.

Baltimore Law School.

The catalogue of the Baltimore Law School for the year 1910-1911 announces that the fall term will begin September 19, and the school will close May 23.

For the convenience of those engaged in business and in office work the lectures will be held in the morning, beginning at 7 o'clock.

The school was organized in 1900, and for a number of years was at the southeast corner of St. Paul and Saratoga streets. In 1904 it became affiliated with the Baltimore Medical College. Since 1908 the school has been at the new labratory building of the Medical College, 849 North Howard Street.

Judge Alfred S. Niles is dean of the school.

New Dean at University of Michigan.

Professor Henry M. Bates, who has been appointed dean of the Department of Law at the University of Michigan, is the fifth dean of this great Law School since it was established fifty years ago.

The new dean is forty-one years old. He was graduated in the '90 literary class of the University, and then took the law course. When he finished his studies he located in Chicago, where he was for a period Secretary of the Chicago Bar Library Association. Seven years ago he returned to Ann Arbor and joined the faculty of the Law School. Last spring he resigned and entered a law firm in Detroit, of which Frank E. Robson, now general attorney for the Michigan Central, is senior member.

He did not, however, surrender his residence in Ann Arbor, and he continued his duties as professor to the end of the University year.

National Universiy Law School.

Practically the only change contemplated in the faculty for the ensuing term is the appointment of Hon. Job Barnard, associate justice of the supreme court of the District of Columbia, to the chair of equity jurisprudence. Hon. James Schouler, the eminent text-book writer and jurist, retires from the faculty at the close of the University year, after a service of over twenty years.

Western Reserve University.

The trustees of Western Reserve University have voted that, beginning with the academic year 1911-1912, only graduates of the colleges of approved standing may be admitted as regular students in the Law School. The change in requirements will not affect those who enter in September, 1910.

Professor Evan Henry Hopkins, since 1892 an officer of the Law School, desiring to devote his entire time to the practice of law, presented his resignation as dean and as a member of the faculty. Professor Walter Thomas Dunmore was appointed dean. Professor Dunmore will enter upon his duties as dean this fall.

Proposed Law School in St. Joseph.

Action looking to the establishment of a law school in St. Joseph, Missouri, was taken recently by a mass meeting of the local bar. All were enthusiastic over the outlook for such an institution, and pledged support to the movement. It is planned to make it a night school, similar to those in Kansas City and St. Louis, and to organize a faculty from the local bar.

"The plan is to establish it on the lines of the Kansas City Law School, which was organized in 1895, and now has an enrolment of over 200 students," said a member of the committee. "We believe we can carry on a full course of study here, and that St. Joseph and the territory adjacent to St. Joseph will support a law school as easily and as successfully as it now supports a medical school.

"The law of this state regarding admission to the bar precludes the young man who is not a graduate of a law school. Yet the only law schools now in the state are these at St. Louis, Columbia, and Kansas City."

New Law Books

"Intoxicating Liquors."—By W. W. Woollen and W. W. Thornton. (The W. H. Anderson Company, Cincinnati) Buckram. 2 vols. $13.50.

This work is not only a treatise upon the traffic in and control of the manufacture and sale of intoxicating liquors, but it also deals with a number of related subjects and in so doing includes a broader field than has heretofore been embraced in works upon this subject. Thus, the subject of drunkenness is examined at length and its effect upon contracts and wills, divorce, negligence, and life insurance is considered, as well as such phases of the question as drunkenness as a defense for the commission of crime and guardians for drunkards.

The two volumes of the work are based upon a study of some 27,000 cases, comprising the body of the case law upon the subject as laid down by the courts of the English-speaking world. The authors have cited all decisions reported in England, Ireland, Scotland, Quebec, Ontario, British Columbia, the British Northwest Territories, Nova Scotia, New Brunswick, Newfoundland, Australia, New Zealand, and in the British possessions of South Africa.

Considerable attention is paid to questions of practice, especially in the chapters on Civil Damages, Abatement and Injunction, Searches and Seizures, Indictment, Evidence, and Trial and Judgment.

A comprehensive work has been made possible by the multitude of decisions which have emanated from the courts during the last quarter of a century, and which would seem to have presented almost every question that could possibly be raised concerning the liquor traffic and its regulation. This treatise affords a ready reference to any particular question discussed in this vast body of case law.

"Actions by and against Corporations."—By Joseph Asbury Joyce. (The Banks Law Publishing Co., New York) Buckram. $6.50.

In this work the author has considered fully the principles upon which actions by and against corporations are based, especially those constitutional principles which are the foundation of corporate actions and defenses, and which are usually the first questions involved in actions in which corporations are parties. The right of action and defenses in matters relating to the supervision and control of corporations by supervisory commissions has also been fully considered. The treatment of these subjects and underlying principles is followed by a discussion of the jurisdiction of courts, not only over corporations, but also over corporate supervisory bodies and the jurisdiction or powers of such bodies; the removal of suits; parties, including stockholders' rights and liabilities; and the various actions at law and in equity, including penalties, and criminal offenses, in which questions concerning corporations have been involved.

The book bears evidence of careful workmanship, and ably presents the learning upon a question of great and growing importance.

"The Law Relating to the Rule of the Road at Sea."—By David Wright Smith, M. A., B. L. Solicitor, Glasgow. (James Brown & Son, Glasgow) 7/1.

The object of this book is to explain the law relating to the Collision Regulations, as laid down in the decisions of the courts, in such a way as to be of service at sea. Extracts from the leading judgments in many of the cases, as well as the facts on which the cases have been decided, are given, so far as necessary to illustrate the points dealt with in the text. A table of the reports in which the cases are to be found is given. The intention of the framers of the Regulations in regard to the effect of the various Articles, as far as it may be gathered from the published Protocols of the Washington Conference, has also been noted where necessary. References to the Protocols and to the numerous Parliamentary and official publications on the subject will be found in the footnotes.

Some practical matters closely connect-

ed with the Regulations, without which a knowledge of the working of some of the Rules is impossible, are also dealt with, a number of points being illustrated with diagrams for the sake of clearness.

The work well deserves the attention of every practitioner in admiralty.

Loveland on "Bankruptcy." 4th ed. 2 vols. Sheep or Buckram, $12.

"Bar Examination Review." By Albert H. Putney. 1 vol. Buckram, $4.

"The Federal Penal Code." In force January 1, 1910. Annotated by George F. Tucker and Charles W. Blood. 1 vol. Law Canvas, $5.

"Consolidated Index to Remington and Ballinger's Annotated Codes and Statutes of Washington." 1 vol. $2.

"New Consolidated Index to the Codes and General Laws of California. 1 vol. $6.40 net.

"The Visigothic Code (Forum Judicum)." Translated from the original Latin and edited by S. P. Scott. 1 vol. Buckram, $5.

"Incorporation, Organization, and Management of General Business Corporations in Illinois." By William Meade Fletcher. 1 vol. Buckram, $7.50.

"1910 Supplement to Green's California Digest." By James A. Ballentine. Covering cases in vols. 148-154 California Reports; vols. 2-9 California Appellate Reports; vols. 1-5 Coffey's Probate Decisions; and the California decisions in vols. 89-99 Pacific Reporter. 1 vol. Buckram, $8.50.

"Digest of volumes 61-80, Inclusive, South Carolina Reports." By C. J. Ramage. 1 vol. $7.50.

"International Law." Hornbook Series. By George Grafton Wilson. 1 vol. Buckram, $3.75.

"A Treatise on Code Pleading and Practice." Adapted to Practice in California, Alaska, Arizona, Idaho, Montana, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Other Code States. By William A. Sutherland. 4 vols. Buckram, $26.

"Standard Encyclopædia of Procedure." Arthur P. Will, editor-in-chief; James DeWitt Andrews and Edgar W. Camp, supervising editors. In 18 vols. One volume every three months. $6 per vol.

"Georgia Words and Phrases." By Dean E. Ryman. 1 vol. Buckram, $6.

Recent Articles in Law Journals and Reviews

Airships.

"The Air—A Realm of Law."—14 Law Notes, 69.

Bills and Notes.

"An Ambiguity in the Negotiable Instruments Law."—23 Harvard Law Review, 603.

"The Negotiable Instruments Law."—27 Banking Law Journal, 403.

Contracts.

"Moral Obligation as a Consideration for an Express Promise."—17 Case and Comment, 120.

Corpus Juris.

"An American Corpus Juris."—22 Green Bag, 428.

Courts.

"Powers of Courts in Vacation."—17 Case and Comment, 107.

"Log Cabin Courts of Long Ago."—17 Case and Comment, 114.

Criminal Law.

"An Accusation of a Prisoner by a Person Not Called as a Witness."—74 Justice of the Peace, 315, 326.

"The Third Degree—An Illegal Procedure."—71 Central Law Journal, 24.

"The Pardoning Power."—14 Law Notes, 65.

"The Red Robe."—22 Green Bag, 393.

Curtesy.

"The Estate by the Curtesy."—10 The Brief, 91.

Divorce.

"Uniform Divorce Legislation—A Reply."—22 Green Bag, 387.

Equity.

"Mistake of Fact as a Ground for Affirmative Equitable Relief."—23 Harvard Law Review, 608.

Fuller.

"Melville W. Fuller."—17 Case and Comment, 105.

Highways.

"Extraordinary Traffic: 'By or in Consequence of Whose Order.'"—74 Justice of the Peace, 325.

"Pavement Lights and Gratings."—74 Justice of the Peace, 314.

Hindu Law.

"A Study of the Growth and Development of Hindu Law."—20 Madras Law Journal, 175.

Injunction.

"Government by Injunction—the Misuse of the Equity Power."—71 Central Law Journal, 5.

Insurance.

"The Validity of Contracts of Indemnity for Liability to Third Persons Arising Out of Negligence."—71 Central Law Journal, 39.

Interstate Carriers.

"Federal Control of Stock and Bond Issues by Interstate Carriers."— 42 Chicago Legal News, 384.

Judgment.

"Affirmance of Judgment by a Divided Court."—42 Chicago Legal News, 412.

Jury.

"Suggestions for the Improvement of the Jury Service."—22 Bench and Bar, 13.

Justice of the Peace.

"The Selection of Justices."—74 Justice of the Peace, 349.

Legislature.

"Laws Which Legislatures are Unfit to Make."—17 Case and Comment, 111.

Libel.

"Publication to Stenographer in Libel."—10 The Brief, 87.

Mortgage.

"Remedies of Mortgagor and Mortgagee When the Same Person Holds Two Mortgages over the Same Property."—20 Madras Law Journal, 168.

Municipal Corporations.

"Extension of Borough Boundaries and Financial Adjustments."—74 Justice of the Peace, 338.

"The Supply of Electric Fittings by Municipal Corporations."—74 Justice of the Peace, 350.

Negligence.

"The Supply of Dangerous Articles."—42 Chicago Legal News, 411.

Philippines.
"Law in the Philippines."—10 The Brief, 77.

Principal and Agent.
"The Liability of an Undisclosed Principal. II."—23 Harvard Law Review, 590.

Public Service Corporation.
"Illegality as an Excuse for Refusal of Public Service."—23 Harvard Law Review, 577.

Schools.
"The Liability for Accidents to School Children."—74 Justice of the Peace, 338.
"The Liability for Accidents to School Children under English Law."—42 Chicago Legal News, 412.

Taxes.
"The Constitutionality of the Federal Corporation Tax."—40 National Corporation Reporter, 798.

Trial.
"Directing Verdicts."—16 Virginia Law Register, 241.
"The 'Summing Up.'"—17 Case and Comment, 124.
"Remittitur in Verdicts, Where Excess is Not Exactly Calculable."—70 Central Law Journal, 438.

Trusts.
"Precatory Trusts."—31 Australian Law Times, 93.

Wallace.
"Life and Character of William T. Wallace."—22 Green Bag, 379.

Waters.
"Irrigation—Owner of a Prior Right to Water for Direct Application, Privileged to Store Same for Future Use."—71 Central Law Journal, 58.

Wills.
"Probate of Will without Attestation Clause Where Witnesses are Dead or Absent."—22 Bench and Bar, 19.

The older civilizations failed because they meant only the uplift of the few, but our institutions are conceived in a nobler spirit and work to a higher end. Side by side, hand in hand, helpful to each other, have gone our marvelous material development and the increasing humanity of our laws.—Frederick W. Lehmann.

Quaint and Curious

Odd legal incidents gleaned from modern chronicles.

A Sartorial Reason.—Apropos the late Edmund Baxter's experience in the United States Supreme Court, regarding the appearance of attorneys before that bar only in Prince Alberts, recited in the August CASE AND COMMENT.

Jones, attorney, and Smith, ditto, at one time left their respective towns in the middle West and traveled to Washing to argue *Doe* v. *Roe* before the Supreme Court. Jones, representing Doe, was familiar with the rule referred to, while Smith was not, and, as a result, the latter appeared in simple sack suit. At the conclusion of the arguments and as the two attorneys were on their way to the hotel, Jones informed Smith of the breach he had committed, and Smith, of course, was much perturbed.

In due time, the attorneys received the decision, and Smith's client had lost the case. Smith thereupon finally penned the following to his client:

Dear Sir:—

I am to-day in receipt of the opinion in *Doe* v. *Roe*. With much regret, I have to advise that you have lost your case in the court of last resort. Under other circumstances, I should take the defeat as a matter of course, but, under the circumstances, I feel that I am, in a measure, to be blamed for the loss. They have a rule in the Supreme Court that any attorney appearing before it must wear a Prince Albert. I did not know of this rule until after the case had been argued, and then it was too late. Of course, the Supreme Court didn't give that as a reason for beating us, but it was a *d—— sight better than any reason they did give.*

Yours truly,
Smith.

Novel Proof of Death.—Accompanying a beautiful casket inlaid with pearl, containing the heart of her husband, Count Julian de Ovies, former Chilian consul at Pittsburg, Pennsylvania, Countess de Ovies will soon journey to Madrid to deposit the heart as her sovereign proof in claim of the Spanish estate of her dead husband.

The grewsome ritual is in accordance with the law of Spain, which provides that the heart of any member of the royal family dying abroad shall be preserved after identification by the government officials of the country wherein the death occurred, the physicians attending, and the Spanish consul in the country, and shall be forwarded to Madrid as proof of the death of the subject.

When delivered in Madrid the casket will be opened with impressive ceremonies in the presence of court dignitaries, and the widow, with her attorneys, will make formal demand to the Crown for the estate.

Her "Laughable Husban."—"I farbid you give Santford Tennant any divurce. He is my laughable husban. (Signed) Lucretia Tennant."

The above missive, addressed to the clerk of the "candy court," recently found its way to W. H. Coleman, clerk of the county court at Pittsburg, Pennsylvania. The divorce records were searched, but there was no evidence of any libel having been filed by "Santford Tennant." Lucretia's fears, apparently, were groundless.—Evening Star.

Better Say it Anonymously.—A man called up a judge on the 'phone, says the Cleveland Plain Dealer, and spoke disparagingly of his decisions. The judge said: "Who is this talking?" He asked it in a casual way, just as you'd ask it yourself, and the man frankly replied. When a man is mad he forgets diplomacy.

Instead of telling the judge that his name was Sylvester Jones, when it was really something else, he gave his right name, and asked the judge not to forget it.

The judge said he wouldn't.

A little later the man was under arrest, charged with contempt of court.

And when he apologizes it won't be over a 'phone.

The Strenuous Life Prohibited.—The Utah legislature has tremendous questions to deal with, and consequently one is not surprised to read in chapter 49, Session Laws 1909, the following: "Every person who maliciously and wilfully disturbs the peace or quiet of any neighborhood, family, or person by loud or unusual noises, or by discharging firearms, or by tremendous or offensive conduct, etc."

Town without Taxes.—Orson, a town in Sweden, says the Chicago Tribune, is probably the only municipality in the world which has ordinary city expenses, but which imposes no taxes. Moreover, the local railway is free to every citizen, and there is no charge for telephone service, schools, libraries, and the like. This happy state of affairs is due to the wisdom of a former generation of citizens and rulers of Orson, who planted trees on all available ground. During the last thirty years the town authorities have sold no less than $5,000,000 worth of young trees and timber, and judicious replantings have provided for a similar income in the future.

Indiscreet Poll.—*Une Revue Juridique* of Breslau, so we read in a Paris newspaper, gives an account of a difficult question which was before the divorce court of Silesia. A husband sought divorce from his wife on the ground of unfaithfulness. He had no evidence in the ordinary sense, documentary or parol. His one and only witness was his parrot. The husband had been away for six weeks, and, when he returned, the parrot was constantly saying: "Arthur, my dear Arthur." Then in a louder tone: "My sweet; my heart, my loved one." The parrot was so persistent that the husband brought his petition, making a close friend, whose name was Arthur, the correspondent. The husband's counsel demanded the receivability of the parrot's evidence, but counsel for the wife maintained that only a person could be called as a witness. While the debate was in progress, the wife confessed, so the court was not called upon to give a ruling as to whether a parrot was or was not a competent witness.—The Law Times.

Reformed Procedure Unnecessary.—At a bar dinner forty or fifty years ago, writes E. W. McGraw, of the San Francisco Bar, the following toast was proposed and met with an enthusiastic reception:

"The Court of Cupid: A court where lawyers' pleas always please, where every suit is commenced by an attachment, where the execution takes the body, and supplementary proceedings never fail to satisfy the judgment."

Domestic Application of the Closure Rule.—An Indianapolis woman who used fly paper to close the mouth of her mother-in-law was recently fined $10, but lost her mother-in-law as a member of the family. The latter admitted in court that she was a "very tedious old person," and told of the pasting of the fly paper across her mouth.

"Judge, I just could not stand it," explained the fair defendant. "She criticized my hair and my dress. I did use the fly paper, but she deserved it."

The wife has appealed to the higher courts to determine whether she is really censurable.

Dogs as Deputies.—For the first time in the history of Missouri two hunting dogs have been regularly designated as deputies, and attached to the office of the state by Jesse A. Tolerton, the present commissioner. By an instrument bearing the seal of Missouri, he certifies that Lady and Queeny are regularly attached to the working force of his office, and requests that they be so recognized, and adequate opportunity be given them to do the work for which they are employed. These two new state employees are of the English setter variety, and their part of the work is to walk around and look wise where the game wardens suspect that game is secreted. Around railroad stations is where they are found most useful, and all that the deputy game warden has to do is to lead them through a pile of baggage, and when Lady or Queeny gives a knowing sniff, and comes to a halt with her nose indicating a clew, to follow this information, confiscate the baggage, and find the quail.—St. Louis Globe-Democrat.

Judges and Lawyers

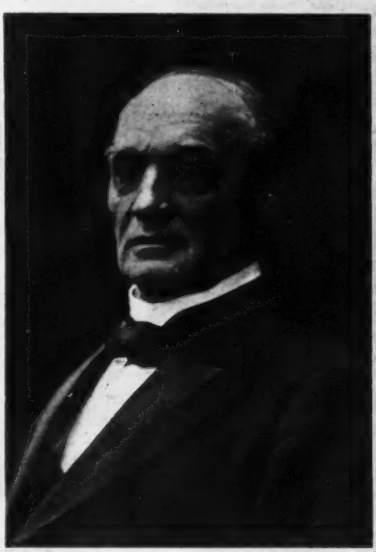
A contemporary record of notable men

John G. Carlisle

One of the Greatest Intellects of the Age.

John Griffin Carlisle was born in Campbell (now Kenton) county, Kentucky, September 5, 1835. He was admitted to the bar in 1858. He served as a member of the Kentucky house of representatives from 1859 to 1861, and as a state senator from 1866 to 1871. In the latter year he was elected lieutenant governor of Kentucky, serving until 1875.

He entered upon a great parliamentary career in Washington in the forty-fifth Congress, when at a bound he slipped to the front, the leader of a majority side that included Randall, Morrison, Mills, Tucker, Stephens, Knott, Cox, Culberson, and others. His maiden effort was on the Army bill, which contained a provision that soldiers of the United States Army should be employed as a police force at the polls in any election in the states.



JOHN G. CARLISLE

He was chosen speaker of the Forty-eighth, Forty-ninth, and Fiftieth Congresses. He ranked with the greatest speakers,—Macon, Clay, and Stephenson, Blaine and Reed. As a presiding officer he was as great as the greatest, and his mastery of parliamentary law surpassed that of all others. He knew the history of the rule and he saw the reason of the rule. There never has been a speaker more popular with members on both sides. The Republicans saw in him a presiding officer as just as the judge on the bench who held the scale "right adjusted," and their admiration for him was as sincere and as enthusiastic as the Democrats felt and gave voice to. Only one of his decisions was questioned, and on an appeal there was but one vote cast to reverse it. Frye, of Maine, himself a capable and even a brilliant presiding officer, characterized Mr. Carlisle as "the jewel of the Democratic party."

While Mr. Carlisle gained great rank as a statesman, he was equally famous as a lawyer, and during his career he was on one side or the other of some of the most noted cases ever tried in this country. He became an international figure on the question of extradition. He was the first lawyer in this country to successfully contend that when the Federal government entered in-

to an extradition treaty with a foreign government, a fugitive from justice brought into the country on process of extradition should be exempt from prosecution for an offense other than that with which he was charged, until a reasonable time and opportunity had been given for the return of the man to the country from which he was extradited.

His style of oratory was purely forensic. There was neither surplusage nor ornament; only and always simple law and logic, from an unfailing well of learning and a copious outpouring of crystal statement. Usually, when he had stated his case, his argument was made. Take the arguments of Carlisle and see how he scorned the superfluous word. See how he murdered the adjectives and the flower of speech. None of the great men with whom he contended before the Supreme Court of the United States were as laconic as he. No lawyer of modern times appeared before that Tribunal who commanded more attention than he did. When Mr. Carlisle rose to speak it was the habit of the court to bunch itself, as it were, and to listen with rapt interest and respect.

"I consider Mr. Carlisle," said Senator Bailey, of Texas, "perhaps the most intellectual man of the age. I do not confine this opinion to our country, but to the world. I may add, that if you had destroyed every law book, John G. Carlisle would have been able to replace it."

Honorable Samuel L. Gilmore, Representative in the Congress of the United States from the second district of the state of Louisiana, and an able lawyer, died at Abita Springs, where he had gone some weeks ago in the hope of restoring his health. As a young practitioner he was associated with such recognized legal lights as Hon. Carleton Hunt and the late John M. Baldwin.

He was nominated for city attorney on the Citizen's League ticket and elected to that office in 1896. He was successively re-elected to the same office in 1900, 1904, and 1908, serving thirteen years. On March 15, 1909, he resigned the office of city attorney and was elected without opposition to the Sixty-first Congress on March 30, 1909, to fill the vacancy caused by the death of the late Hon. Robert C. Davey, for the second district of Louisiana.

Judge George B. Lake died in Omaha, at the age of eighty-four. He was born at Greenfield, New York, September 15, 1826, and went to Nebraska in 1857. He had been educated at Oberlin College and read law in Elyria. He first practised law in Omaha, in partnership with A. J. Poppleton. Two years after coming to Omaha he was elected to the territorial legislature, and served there for three terms. He was speaker of the house in 1865, a member of the committee that drew up the Nebraska state Constitution, and was a member of the state supreme bench from 1871 to 1884.

On his return to Omaha his practice was with James W. Hamilton, and at a later time, Henry E. Maxwell was added to the firm. He was an active, although silent, member of the firm of Hamilton & Maxwell until very recently.

For a number of years, Judge Lake has been seen more frequently at the Vinton street ball park than at any other public place, and his enthusiastic support of the game, which was equaled only by the fan tendencies of the late Frank E. Moores, led to the custom of recognizing him from the field.

A few years ago every ball game that was played in Omaha was opened with this announcement by the umpire, "Is Mayor Moores here? Is Judge Lake here?—then play ball."

Lester O. Goddard, one of the best known railroad attorneys in the country and for forty years a resident of Chicago, died recently at his home in Riverside.

Coming to Chicago in 1870, he was admitted to the bar in 1883, and soon afterward became identified with the legal department of the Chicago, Burlington, & Quincy Railroad, from which he retired about seven years ago to become a partner in the firm of Kimball, Custer, & Goddard. He was at one time mentioned as a candidate for membership on the Interstate Commerce Commission.

Tennessee's Attorney General

HON. CHAS. T. CATES, Jr.

Honorable Charles T. Cates, Jr., was appointed Attorney General of Tennessee on September 11, 1902. The official title of the office is Attorney General and Reporter, because, in addition to the ordinary and usual duties of Attorney General of a state, the duty of reporting the decisions of the supreme court is imposed upon the office. In Tennessee, the Attorney General is appointed by the five judges of the supreme court, and the term of his office runs for eight years. The supreme court of Tennessee sits in the three grand divisions of the state,— at Knoxville, for East Tennessee; at Nashville, for Middle Tennessee; and at Jackson, for West Tennessee: and it is the duty of the Attorney General to look after and attend to all of the business of the state,—both civil and criminal—in the supreme court, and also in the various Federal courts, and the Supreme Court of the United States, at Washington.

As *ex-officio* reporter of the decisions of the supreme court of Tennessee, the subject of the sketch has published, since 1902, thirteen volumes of Tennessee Reports, known as "Cates' Reports, 1-13," or "Tennessee Reports, 110-121."

During Attorney General Cate's term of office many important cases, involving state revenue, boundary lines of the state, and the regulation of corporations, have been before the supreme court. One of the notable cases in which he appeared was that of the State of Tennessee v. Standard Oil Company of Kentucky, which resulted in a decree of ouster by the state supreme court against the Oil Company, which decree has been recently affirmed by the Supreme Court of the United States.

Another case of general interest, not only in the state, but throughout the Union, was that of Duncan B. and Robin Cooper for the murder of Senator Edward Ward Carmack. The case was brought prominently before the public a short time since, by the pardon, by Governor Patterson, of Duncan B. Cooper within a few minutes after the supreme court had affirmed his sentence of twenty years in the penitentiary for complicity in the murder.

W. S. Thurstin, one of the oldest and most respected citizens of Toledo, Ohio, passed away in his seventy-third year.

Mr. Thurstin was one of the best known attorneys in the state, and was the senior member of the law firm of Thurstin, Seney, & Thurstin, the other members being Wesley Thurstin, Jr., his son, and George E. Seney.

Mr. Thurstin was one of the first to rally to the support of the Union when Fort Sumter was fired upon. He joined the One Hundred and Eleventh Ohio, and with this regiment he served through the great war. He was in the battles before Atlanta and in the siege of that place, and also took part in the battles of Nashville, Franklin, Fort Anderson, Goldsboro, and Kenesaw Mountain. He was honorably discharged at the close of the war, with the rank of captain. He served as a member of the board of education and has held other municipal and quasi public offices. He leaves to his descendants a record made illustrious by service to his country, and made honorable by his dealings with men in the quieter paths of life.

Judge Charles Francis Stone of the superior court of New Hampshire died at his home in Laconia, New Hampshire, at the age of sixty-seven years. He served in the legislature in 1883-4 and in 1887-8, when he was conspicuous in the railway fight. In 1892 he was nominated for Congress, but was defeated. President Cleveland, in 1894, appointed him naval officer of the port of Boston, an office he held for four years. Judge Stone was well known throughout the state of New Hampshire as an upright jurist and as a public-spirited citizen.

Iowa's Attorney General

HON H. W. BYE

Honorable Howard Webster Byers, Attorney General, was born at Woodstock, Richland county, Wisconsin, December 25, 1856, of American parentage. He received a common-school education; moved from Wisconsin with his parents to Hancock county, Iowa, in 1873; located in Shelby county, at Harlan, Iowa, in 1877, and has resided there ever since except three years at Earling, in the same county. He was a farm laborer from his fifteenth to his twentieth year, school teacher from twentieth to twenty-fifth year, clerk in general store from twenty-fifth to thirtieth year, law clerk from thirtieth to thirty-second year, and was admitted to the bar in 1888.

Mr. Byers was a member of the house in the twenty-fifth general assembly, speaker of the house during the twenty-sixth regular and extra sessions, and a member of the house during the twenty-eighth general assembly. He was elected Attorney General November 6, 1906, and re-elected in 1908.

"State laws were enforced in spots only," says a writer in the August number of Hampton's Magazine, "when Mr. Byers became Attorney General. In the interior, the statutes restricting the saloon and prohibiting immorality were very well obeyed; the people believed in them and elected officials who enforced them. But scattered up and down the two boundary rivers of the state were 'river cities' which defiantly disregarded all these laws. Here saloons ran as they pleased, prize fighting was tolerated, public gambling was licensed."

Mr. Byers "sent notices to local prosecuting attorneys that they must do their duty. Within a year, the liquor business of the river cities was transformed and immorality no longer flaunted itself boldly. To-day these cities are living up to the law as well as the interior cities."

Mr. Byers could have continued Attorney General indefinitely had he not preferred to run for Congress. He made the race at the recent primaries, and was defeated. But "as these Iowa insurgents play the game, it is not so important whether you win the first time, but it is important to keep fighting all the time. . . . That is the Byers' way."

Former Judge Craig Biddle of the court of common pleas, Philadelphia, died at his summer home at Andalusia, after a week's illness. He was eighty-seven years old. Judge Biddle had served on the bench for a large part of his life. He was four times elected, and served continuously until 1907, when he retired because of advancing years and was appointed prothonotary of the common pleas courts. Judge Biddle was in the state legislature in 1849, when the bill was introduced providing that the judges should be elected by the people, instead of appointed by the governor. He was instrumental in securing the passage of the measure, under the provisions of which he has been four times elected to office. Judge Biddle heard many noted cases. Probably none attracted more attention than the trial of Senator Quay, on the charge of defrauding the state.

He was graduated from Princeton College in 1841, receiving his A. M. and LL.D. degrees from that institution. Three years later he was admitted to the bar. In Civil War days he served as major on the staff of General Robert Patterson with the forces in the Shenandoah valley. Later he served on the staff of Governor Andrew G. Curtin, of Pennsylvania, organizing new regiments for service.

The Humorous Side

It is good to lengthen to the last a sunny mood.—Lowell.

Save Your Coupons.—The free coupon, receivable in part payment, has been adopted by an enterprising lawyer in the Southwest, who has issued the following circular:

———'s Law Offices
——— Street
Up First Stairway South of ——— Dry Goods Store
'Phone No. ——
—Announcement—

The Law Partnership of C & O has been dissolved. Mr. C retiring. Mr. O will continue the business at the above address, first stairway south of the ——— Dry Goods Store. He will do a general Law Practice. Save the $2.50 Coupon attached hereto, as it will be valuable should you want some Law work done.

Notary Public in Office.

.....

: :
: $2.50 :
: This Coupon entitles the holder :
: to a credit of $2.50 on fee for any :
: Legal Service when presented at :
: office. :
: No person can present more :
: than one coupon. No charge for :
: advice. :
: :

.....

Making Haste by Stopping.—At the last term of an Arkansas circuit court a case was proceeding slowly, and the judge was plainly worried. One of the attorneys suggested to the court that he thought he could save some time if permitted to talk to one of his witnesses for a minute. "All right," was the reply, "if you can make any time by stopping, go ahead."

The Way the Box Looks to the Bench.—A new trial is asked in Cincinnati because the judge smiled at the jury. There are juries in Cincinnati and elsewhere whose appearance would excuse a judge for haw-hawing right out.—Cleveland Plain Dealer.

An Innocent Bystander.—Uncle Mose, needing money, sold his pig to a wealthy Northern lawyer who had just bought the neighboring plantation. After a time, needing more money, he stole the pig and resold it, this time to a Judge Pickens, who lived "down the road a piece." Soon afterward the two gentlemen met, and, upon comparing notes, suspected what had happened. They confronted Uncle Mose. The old darkey cheerfully admitted his guilt. "Well," demanded Judge Pickens, "what are you going to do about it?" "Blessed ef I know, jedge," replied Uncle Mose, with a broad grin. "I'se no lawyer. I reckon I'll have to let yo' two gen'men settle it between yo'selves."—Everybody's.

The Excellence of Simplicity.—"It's a lucky thing foh de human race," said Uncle Eben, "dat de Ten Commandments wasn't loaded down wif phraseology like de laws de legislature passes."—Wash. Star.

A Monopoly of Water.— A Scottish gamekeeper found a boy fishing in his master's private waters, says an exchange. "You musn't fish here!" he exclaimed. "These waters belong to the Earl of A——." "Do they? I didn't know that," replied the culprit; and, laying aside his rod, he took up a book and commenced reading. The keeper departed, but, on returning about an hour afterwards, he found the same youth had started fishing again. "Do you understand that this water belongs to the Earl of A——?" he roared. "Why, you told me that an hour ago!" exclaimed the angler, in surprise. "Surely the whole river don't belong to him? His share went by long ago!"

The Mill That Never Stops.— Figg—"Talking about pugilism and state laws, did you ever notice it?"

Fogg—"Ever notice what?"

Figg—"That there's no law to prohibit fighting in the state of matrimony."—Boston Transcript.

Can't Shock a Vacuum.— Senator Stone, of Missouri, tells of a young physician in Kansas City who was sneered at by an attorney who was cross-examining him, the rude cross-examiner at last asking:

"Are you entirely familiar with the symptoms of concussion of the brain?"

"I am," was the reply.

"Then," continued the rude one, "suppose that my learned friend here, Senator Stone and myself, should bang our heads together, would that make us have concussion of the brain?"

"It might," was the reply, "give concussion of the brain to your learned friend."

Hoss and Hoss.—A verdict was rendered in circuit court at Bowling Green, Kentucky, that was full of humor, and produced a roar of laughter in the court room. H. F. Richmond, who had swapped horses with L. M. Butler, sued him for $75, alleging breach of warranty, introducing evidence that the horse was unsound and to prove that the horse was a "stump sucker." Butler filed a counterclaim, and set up that the horse gotten from the plaintiff had fits.

After only a few minutes in the jury room the jury returned the following verdict:

"We, the jury, find that this is a case of hoss and hoss, that neither the plaintiff nor defendant is entitled to recover damages, and that each shall pay his own costs in this cause expended."

Trustworthy.—"Rufus, you old loafer, do you think it's right to leave your wife at the washtub while you pass your time fishing?"

"Yessah, jedge; it's all right. Mah wife don' need any watching. She'll sholy wuk jes' as hard as if I was dah."—Boston Transcript.

Dead Drunk.—We have heard many definitions of drunkenness, but one given by a witness last month at one of the county courts is, we must admit, new to us. "They don't consider they are drunk," said the witness, "until they lie down and pull the mud over them for a blanket."—Law Notes.

A Point in Law.— A prominent lawyer of Miami recently received a call from a colored woman.

"What's the trouble?" inquired the lawyer.

"It's about mah ole man. He's cahyin' on high wit' a lot o' no-count gals, he is, an' sumfin's got to be done!"

"Do you want a divorce?"

"Go 'long man. Divorce nuffin. Think I'se gwine to gin him des what he wants, an' 'low him to go sky-shootin' round wif dem gals. Not on yo' life, mister lawyer, I doan' want no divorce; what I wants is a 'junction."—National Monthly.

The Judge's Error.—"Give one verse of the Star-Spangled Banner."

"I can't do it, judge."

"Quote a passage from the Constitution."

"Too many fer me."

"Then I can't naturalize you, my man."

"But I was born here, judge. I don't want to be naturalized. I'm after a bailiff's job."—Louisville Courier-Journal.

You'll Do Right if you Don't Write.—This anecdote is told of Abe Hummel, whose picturesque career is well known throughout the Union, and well illustrates the fact that it is not always wise to put things in black and white.

A client of Abe's, who was in trouble and who was deeply repentant, was in little Abey's office one day, and said to him:

"Mr. Hummel, I have about made up my mind that the best policy for a man is to do right and fear nobody."

"Oh no," replied Abe, "your motto should be, 'don't write and fear nobody.'"

An Eye for Business.—When a lawyer recently told his client that the opinion of the court in his case was to be published in the Lawyers Reports Annotated, and this his case would, by reason of its importance, be known in every town of the United States and all over the world, the client quickly inquired: "Can't you get them to add that the plaintiff keeps the ——— Hotel in the lake shore village of M——, meals 50 cents?"